



IDASA'S DEMOCRACY INDEX

**Testing Democracy:
Which Way is
South Africa
Going?**

**Edited by
Neeta Misra-Dexter and
Judith February**

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Testing Democracy: Which Way is South Africa Going?



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CONTENTS

Introduction.....	vii
<i>By Neeta Misra-Dexter and Judith February</i>	

BIOGRAPHICAL INFORMATION	xxv
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PART ONE: DEVELOPMENT AND DEMOCRACY: AN OVERVIEW

CHAPTER ONE: THE ONE-PARTY STATE AND LIBERATION MOVEMENTS IN AFRICA: LESSONS FOR SOUTH AFRICA.....	2
<i>By Aubrey Matshiqi</i>	
CHAPTER TWO: THE DEVELOPMENTAL STATE AND POST-LIBERATION SOUTH AFRICA.....	23
<i>By Samantha Ashman, Ben Fine and Susan Newman</i>	
CHAPTER THREE: POVERTY INEQUALITY AND THE NATURE OF ECONOMIC GROWTH IN SOUTH AFRICA.....	46
<i>By Haroon Borat and Carlene Van Der Westhuizen</i>	
CHAPTER FOUR: BUILDING A PUBLIC SERVICE THAT CAN DELIVER CHANGE.....	71
<i>By Raenette Taljaard</i>	
CHAPTER FIVE: KEY INSTITUTIONS AFFECTING DEMOCRACY IN SOUTH AFRICA.....	94
<i>By Pierre De Vos</i>	
CHAPTER SIX: BENEATH THE SURFACE: CIVIL SOCIETY AND DEMOCRACY AFTER POLOKWANE.....	117
<i>By Steven Friedman</i>	

**PART TWO: IDASA’S DEMOCRACY INDEX 2010:
100 QUESTIONS**

100 QUESTIONS	142
SECTION ONE: PARTICIPATION AND DEMOCRACY	150
<i>By Kate Lefko-Everett</i>	
SECTION TWO: ELECTIONS AND DEMOCRACY	169
<i>By Justin Sylvester and Paulos Eshetu</i>	
SECTION THREE: ACCOUNTABILITY AND DEMOCRACY	190
<i>By Gary Pienaar</i>	
SECTION FOUR: POLITICAL FREEDOM AND DEMOCRACY	226
<i>By Shameela Seedat</i>	
SECTION FIVE: HUMAN DIGNITY AND DEMOCRACY	257
<i>By Justin Sylvester and Nonhlanhla Chanza</i>	

INTRODUCTION

BY NEETA MISRA-DEXTER AND JUDITH FEBRUARY

The purpose of this book is to assess South Africa's democracy in terms of the goals that defined the country's democratic transformation in 1994. It attempts to do this in two ways. Firstly, it aims to give readers an overview of the key challenges facing South Africa's democracy today. The country's performance in meeting these challenges is assessed in chapters written by academics and policy analysts. These are wide-ranging overviews, designed to give an insight into the broad debates in each area.

The book also sets out to provide a more detailed assessment of South Africa's democracy through Idasa's Democracy Index, comprising 100 questions that interrogate how closely, in practice, democracy meets the broadly defined ideal of popular self-government. In doing so, the Index gauges the difference between the procedural forms of democracy and what really occurs in terms of citizens realising their socio-economic and political rights. Now in its third iteration, the Index is Idasa's attempt to formulate a set of questions that captures its vision of democracy as an embedded system of institutions, supported by active citizens and a vibrant political culture, that are vital if democracy is to be owned, promoted and deepened by citizens.

In assessing democracy, this book recognises that South Africa has created the framework for a sustainable democracy. The consensus is that the country has successfully set up formal institutions of democracy and enacted a Constitution that enshrines political and socio-economic rights. It is in the functioning of institutions, in the interpretation of the Constitution and in providing access to basic rights that democracy falls short. Weak institutions, a significant characteristic of South Africa's democracy, struggle to promote the effective functioning of the state, and fail to provide the checks and balances necessary for democracy to flourish.

The general state of economic under-development that defines the reality of the majority of South Africans is another defining characteristic of South Africa's democracy. Citizens who struggle to gain access to employment, housing and transport, and suffer from ill-health, a lack of clean drinking water and inadequate education are limited in their political participation. Resource constraints create significant barriers for the poor, often limiting them to voting or protest action, preventing them from effectively engaging in other democratic processes that would make government more responsive to their needs.

For this reason, the 2010 edition of the Democracy Index focuses on the relationship between democracy and development. A considerable body of academic literature deals with this relationship, but much of it is based on a narrow definition of development or democracy. It tends to reduce the former to growth and the latter to the political regime, and to use empirical evidence in seeking a statistical correlation between the two. At a conceptual level South Africa's democracy has not suffered

from such constraints; since 1994 it has been generally accepted that democracy and development are inextricably linked.

This emerges clearly from three key documents from the dawn of democracy which emphasised democratic rule as the vehicle through which development should take place and the interests of formerly disadvantaged citizens advanced: the African National Congress's "Ready to Govern" document; the Reconstruction and Development Programme (RDP); and the Constitution crafted in the mid-1990s. The first democratic election in 1994 was, therefore, not just about winning votes – it was about using electoral power to redress centuries of underdevelopment for the mass of South Africans. Democracy was seen as being about more than electoral rights, checks and balances against the misuse of power and an active citizenry; it was also about economic rights and the government's obligation to enable citizens to realise these.

The new rights dispensation for all South Africans had to be coupled with the ability to access, realise and fight for these rights. Lived democracy was as much a matter of clean water, housing, employment and health care as it was about the right to vote. The apartheid system had cynically engineered a system where the lack of political rights was used to deny most South Africans basic human and economic rights. The democratic system, therefore, had to ensure that hard-won political rights were a means to alleviate the hardships facing most South Africans.

Sixteen years after the advent of democracy, this book revisits the relationship between development and democracy envisaged in 1994. South Africans today have some of the highest levels of poverty, inequality and unemployment in the world. HIV/Aids continues to cause a humanitarian crisis, despite the refreshing acknowledgement of the epidemic by Jacob Zuma's government after the denialism of the Thabo Mbeki era.

Compounding these crises is the generally poor state of the public service. Widespread economic underdevelopment also has major resource implications for citizens wishing to participate in civil society. In South Africa it has impeded the development of a civil society that is truly representative of the citizens that it speaks for and therefore civil society has not always successfully articulated the needs and concerns of their constituencies.

Moreover, because of prolonged dominant-party rule, many of the checks and balances and separation of powers envisioned and enshrined in the Constitution are being eroded. This has weakened institutions, leaving them less able to provide the oversight needed for the effective functioning of the state.

Fuelling this mixture of economic and political stresses are social factors such as race, immigrant status and gender. In May 2008, a wave of xenophobic attacks swept through South Africa and continuing outbreaks of xenophobia pose a serious threat to South Africa's nascent human rights culture. Violence and instability need to be studied by integrating social, economic and cultural factors and it is often economic stresses such as poverty "coupled" with social issues such as racial inequality that creates a volatile environment that fosters violence.¹

Working from the premise that development and democracy are interrelated, this book analyses these key issues with the aim of outlining the main challenges to South Africa's democracy at present. In the pursuit of both development and democracy, we have assumed that there is an interface between political rights on the one hand and economic needs on the other.²

The first six chapters of the book explore the main issues of economic underdevelopment and democracy by interrogating the political regime, development policy, poverty and inequality, the public service, the functioning of state institutions and the state of civil society in South Africa. Intolerance and racial tension are dealt with in the Democracy Index.

The political regime is the starting point of our analysis. Since 1994, the ANC has governed South Africa in a system of dominant-party rule democratically mandated by the people in elections. In the early life of post-liberation states, dominant-party or single-party rule is well-nigh inevitable – but its consequences are less predictable. Since 1994, the main cause of political conflict in South Africa's dominant-party system has been the ANC's internal power struggles.

Particularly since 2003, conflict between factions of the ANC has spilled into the public domain, and the accusations and counter-accusations have played out in the courts and the media. More importantly, these internal battles have had consequences for democracy, as ANC leaders have repeatedly conflated the interests of the party with those of the state. To harness state power to the goals of individuals in the party, institutions have been tinkered with, the judiciary has been attacked, and people have been deployed to state positions based on loyalty rather than merit.

The struggle for power in the ANC, culminating in the party's conference in Polokwane in 2007 at which Jacob Zuma deposed Thabo Mbeki as ANC president, is widely seen as a seismic shift in South Africa's post-apartheid political history. Zuma's rise to power was viewed as an opportunity for change that would transform the ANC into a more democratic organisation that encourages internal debate. But already the meaning of these events, and their implications for the future, are less clear.

Has Polokwane deepened democracy in the ANC, with a positive knock-on effect on the government? It has been argued that the political space that was often closed down or neglected during the Mbeki years has opened up, but the evidence is too uneven to support this claim. Others argue that the ANC has failed to capture the moment and business continues as usual, indicating that Polokwane brought little more than an internal regime change. What is clear is that the ANC's internal battles have highlighted the threats posed to democracy by dominant-party rule, allowing the ruling party to meddle with institutions to achieve narrow goals that are not necessarily in the broader interests of the nation.

In chapter one, Aubrey Matshiqi analyses the relationship between dominant-party rule and democracy. Although he distinguishes between democratically sanctioned single-party rule and forms of single-party government that are imposed on citizens, he emphasises that the former can yield undemocratic outcomes and cautions

against the tendency, in periods of prolonged single-party rule, to equate the party's interests with those of the nation.

Matshiqi looks at South Africa in the context of liberation movements across the African continent, examining both the similarities and differences. The most significant difference is that "South Africa's political settlement was modeled on the institutional imperatives of the liberal-democratic 'second wave' of democratisation in Eastern Europe, Latin America and Africa ... (resulting in) the rule of law and supremacy of the constitution second only to a few states in the liberal-democratic world". Where South Africa resembles other post-independence African states, however, is in the tendency to see the ANC as "a vehicle for capturing the state", leading to patronage and corruption, as well as threats to the stability and credibility of institutions. Matshiqi also explores the internal tensions that liberation movements face as they try to redefine themselves as modern political parties and standard-bearers of an incomplete liberation.

Matshiqi's chapter highlights the key issues facing South African democracy amid continuing dominant-party rule. Among his themes are the conflation of state, party and society; the capture of the ruling party by political and business elites; and the compromising of the independence of state institutions as they become accountable to the party rather than the people. He points out that post-colonial single-party dominance does not invariably result in failure. Citing the reinvention of liberation movements in India and Nicaragua as modern political parties, he suggests that the ANC should embrace modernity and internal democracy to connect with citizens and remain politically relevant.

Dealing with some of the conceptual issues relating to democracy, he emphasises the importance of taking history and context into account in understanding South Africa's democratic system, and highlights how race shapes expectations. He identifies as a key requisite of democracy in South Africa the "antithesis of apartheid authoritarian rule" – ensuring that groups do not feel excluded from policy processes. He identifies three important variables that will foster the deepening of democracy in South Africa: a plurality of socially constructed expressions; bridging the gap between the procedural and substantive aspects of democracy; and institutional certainty.

The economic policies and development path adopted by the government are obviously central to the question of under-development. South Africa's developmental strategies have followed a number of trajectories since 1994. In the mid to late 1990s, the government oscillated between the Keynesian-style RDP and the more neo-liberal Growth, Employment and Redistribution (Gear) policy. In recent times, the idea of the developmental state has been put forward to indicate a radical shift from the failed development policies of the past. The phrase "developmental state" has become the favoured formulation to express the developmental goals of government, the ANC and its alliance partners, the South African Communist Party (SACP) and the Congress of South African Trade Unions (Cosatu). Politicians, ministers and political leaders often cite it as a panacea for South Africa's economic ills. Is this a

cynical attempt to repackage existing policies or a genuine attempt to break with the past and fashion a more pro-poor development path?

In chapter two, Samantha Ashman, Ben Fine and Susan Newman explore the concept of the “developmental state” as it relates to South Africa. They outline the historical precedents for the term as it was applied, in hindsight, to the developmental achievements of Japan and the newly industrialising countries of East Asia at a particular point in time.

Before assessing how closely South Africa follows the developmental state paradigm, the authors provide a lucid critique of the developmental state model, pointing to its analytical flaws and limitations in conceptualising the relationship between the market and the state. They argue that it needs to incorporate a broader view of development that corrects the duality between market and state and addresses the relationship between class and state over time. They also contend that the developmental state paradigm should be broadened beyond industrial policy to include agriculture, health and welfare, among other areas.

Ashman, Fine and Newman go on to argue that post-apartheid South Africa has in fact moved away from a developmental state model, because of its continued adherence to historical patterns of development based on the minerals-energy complex. This is defined as a complex interaction between a core set of industrial sectors and a partnership between the state, state capital and private capital that has survived and prospered because of economic policies in the post-apartheid period that favour the interests of conglomerate capital over a new developmental path. The authors argue that post-apartheid measures, such as Gear, have facilitated the smooth exportation of capital, denying the country valuable domestic investment that might facilitate the creation of a developmental state. They write:

In each of these respects, then, the South African state in the post-apartheid period has been the antithesis of a [developmental state] harnessing funds for investment, preferring to adopt neo-liberal economic orthodoxy in deference to private capital's global goals, rather than coaxing or coercing private capital to invest in order to achieve economic growth and structural transformation.

It is, therefore, “farcical” for South Africa to preach the developmental state model when its macro-economic policies suggest the opposite. To move towards such a model, a radical departure from current macro-economic policy is required that would prioritise the welfare needs of the majority of South Africans over the interests of capital. Although Zuma’s government has alluded to the need for change, it has so far seemed to be paying lip-service to economic reform, making no substantive changes that would point to the creation of a developmental state.

There is evidence to suggest that poverty, inequality, lack of economic growth and poorly distributed growth are inhibiting the exercise of democratic rights. Inequality, for example, has obvious implications for social cohesion and other negative

consequences for the quality of democracy, including “decreased electoral turnout, depressed political engagement, and higher rates of crime including homicide”.³ Studies have also shown that it fuels support for “populism, personalism, human rights abuses and the acceptance of authoritarian rule”.⁴

The link between poverty and the quality of democracy has always been clear. Citizens need political rights and functioning democratic processes to put pressure on the government to deliver basic services and voice their displeasure about economic policies that fail to address their needs. Conversely, citizens are inhibited from participating in these processes and voicing their concerns in appropriate and varied forums at least in part due to material hardships in their everyday lives.

While simple electoral voice may not be sufficient to transform economies, democracy offers governance, fosters institutions and creates a space for civic mobilisation. It creates an advantage for promoting economic development. The potential benefits of democracy on economic development are apparent.⁵ Yet this interface is not one-sided. Endemic poverty has dis-benefits for democracy as it can lead to social instability; it disconnects citizens from the government and leads to the alienation of the poor. It prevents citizens from voicing their concerns within the dominant development and democratic processes that exist. Access to adequate health care, transport, water, electricity and housing are among the fundamental material requirements that allow citizens to substantively participate in democracy in a way that ensures that government listens to them.

Chapter three provides a statistical analysis of poverty, inequality and growth in South Africa since 1994. Haroon Borat and Carlene van der Westhuizen use Income Expenditure Survey data to provide a rigorous analysis of changes in growth, inequality and poverty between 1995 and 2005, giving a clear assessment of what has been achieved and the remaining challenges after the first decade of democracy. The authors particularly focus on identifying whether growth during this decade has been “pro-poor”. One of the more reassuring results is that overall there has been a moderate decrease in poverty both in absolute and relative terms, and that Africans have been the largest beneficiaries of this shift. However, they still comprise a disproportionate share of South Africa’s poor people. In 2005, Africans represented 79% of the population, but 93% of the population living on less than R322 a month, while whites comprised 10% of the population and just 1% of the poor. Female-headed households were at least equal beneficiaries of gains in poverty reduction compared with their male counterparts.

The results for income inequality are less positive. Overall, inequality has risen in the first decade, making South Africa “one of the world’s most consistently unequal countries”, although inequality among Africans has remained relatively unchanged over the decade. The authors contend that it is mainly income inequality between racial groups, rather than within racial groups, that is causing the rise in aggregate income inequality in South Africa. Some of the growing income inequality is explained with reference to the distribution of positive growth achieved over the decade. All South Africans experienced positive growth in their levels of expenditure, with those

at the very top and bottom of the distribution experiencing the highest levels. However, growth among the wealthy has outstripped that of the poor, fuelling inequality. The authors conclude that “growth may have been pro-poor in the absolute but not in the relative sense”.

Bhorat and Van der Westhuizen set out to explain the increases in expenditure by poor households by looking at the distribution of social grants and their contribution to household income. Social grants accounted for between 50% and 60% of household income in the bottom three deciles for 2005, compared with 35% in 1995. The authors believe that this rapidly widening state social security system accounts for much of the expanded expenditure of the poor.

They also contrast this with the phenomenal increase in expenditure of South Africans in the 80th percentile and above, observing “that this trend shows higher returns for whites and coloureds ... a stark reminder both of the distributional consequences of economic growth and its powerful racial manifestations”.

As South Africans are repeatedly asked to make compromises and accept policies designed to accommodate a higher growth trajectory, the authors’ analysis suggests that we need to question how the benefits of growth are distributed, and evaluate whether the trade-offs for achieving such growth are justified. Any assessment of growth, the authors point out, should be based on how income, assets and opportunities are distributed.

It follows from this analysis that the most significant factor in poverty alleviation is the creation of a viable public service. Access to affordable basic services such as water, health care, electricity and housing are not just basic rights – they are vital in combating poverty. Unsurprisingly, the delivery of services is one of the most volatile political issues of the day. The generally poor state of the public service has contributed to much of the social instability in South Africa post-1994, which often takes the form of protests against the lack of public service “delivery”.

Sensing the urgency of the issue, Zuma’s government has become more vocal about the shortcomings of the public service and committed itself to reforming the system. It is too early to say if these measures will take root, but the government’s response shows that it grasps the implications of service delivery for the stability of South African society – never mind the outcome of municipal elections in 2011.

In 1994, the ANC government inherited a public service based on the British model that was outdated, corrupt and inefficient, providing limited, inferior and discriminatory services. In chapter four, Raenette Taljaard looks at both the changing attitudes in government towards the public service and whether the latter has internalised the values of New Public Management (NPM). Taljaard argues that the public service since 1994 has undergone various phases of restructuring, including rationalisation and policy development and the current phase of modernisation and implementation. Although the relevant legislation has been revamped to enable it to perform, and the Public Service Commission (PSC) has provided effective monitoring and evaluation, the public service still faces significant challenges. These include racial

transformation, improved efficiency and effectiveness, institutionalising the values of the NPM, a severe skills shortage and the challenges of corruption, particularly those that arise from public officials doing private business with the government.

The most pressing issue is the creation of a single public service. The government hopes that this will create a “single window” for the provision of a range of services and consolidate the three spheres of government – local, provincial and national – to ensure their co-ordination. However, opposition parties have criticised the creation of a single public service on the grounds that it centralises power, perhaps in breach of the constitutional provisions on the powers of provincial and local government, and will allow the ANC-controlled national bureaucracy to undermine opposition electoral gains at local and provincial levels.

Taljaard also alludes to recent developments that have the potential to affect service delivery, including the creation of separate ministries dealing with national planning and monitoring and evaluation. These create significant possibilities for greater oversight and efficiency in the public service, but the author cautions that their roles will have to be clearly defined to ensure that there is no overlap with the constitutionally created PSC and that appropriate channels of communication must be found to facilitate collaboration.

Taljaard concludes her assessment by warning:

What must not be lost sight of is that a robust public service is the thin line between service delivery and societal anarchy and anger. The rampant protests engulfing a promising young democracy trying to bring real change to citizens trapped in systemic social exclusion and poverty, which marred its past, cannot be allowed to be the hallmark of the future.

The role of institutions and their health is another important indicator of the quality of democracy – political institutions play a critical role in deterring the centralisation and misuse of executive power. The strengthening and independence of both formal and informal institutions – civil society, a free press and a functioning education system – are central to ensuring that a democratic culture prevails. Informal institutions play a significant role in ensuring that institutions such as the judiciary and the Reserve Bank play an independent role, and in checking the concentration of executive power.⁶

Recently, the ANC’s internal battles have led to controversies over political interference in the work of the National Prosecuting Authority (NPA), the National Intelligence Agency (NIA) and the now defunct Directorate of Special Operations (the “Scorpions”), as well as attacks on the judiciary. This suggests that South Africa’s democracy faces a range of challenges in strengthening state institutions. The ANC’s practice of cadre deployment – which rewards party loyalty over fitness for the job – means that political allegiance is allowed to compromise and undermine the effectiveness of state institutions.

In chapter five, Pierre de Vos studies four vital institutions in South Africa and how they measure up in the consolidation of the democratic order: Parliament; the judiciary; the National Prosecuting Authority (NPA); and Chapter Nine institutions, which include the South African Human Rights Commission, the Public Protector and the Auditor General. Given that most state institutions had almost no credibility during apartheid, a central goal of the architects of South Africa's new order was the transformation of institutions and the creation of new ones to move the country towards an open democracy based on human rights and human dignity, one which provides recourse when citizens' rights are violated.

De Vos highlights some of the recent controversies surrounding the selected institutions and explores the structural and procedural problems that have prevented them from delivering on their mandate. A key theme is that the current dominant-party system, coupled with an electoral system that chooses representatives of provincial legislatures and Parliament from party lists rather than by direct election, makes legislature members accountable to their parties rather than the people. This also allows for an excessive concentration of executive power and dilutes the checks and balances necessary for the effective functioning of representative institutions. De Vos describes how the system affects Parliament:

Because members of the executive are usually senior members of the governing party and also serve in Parliament, more junior members of the governing party are often required to oversee and hold to account members of the executive who are also party leaders ... because of a tradition of strict party discipline requiring members of Parliament to toe the party line, it may be difficult for Parliament to exercise its oversight mandate over the executive.

He also highlights the problem of political interference, arguing that the wide interpretation of laws governing the NPA has allowed for political meddling in its affairs, both in its treatment of high-profile political cases and the president's appointment of the National Director of Public Prosecutions (NDPP). De Vos remarks:

Despite all the safeguards built into the Constitution and the NPA Act, a perception has taken hold that they have not enabled the NPA to do its job without fear, favour or prejudice. As events have shown, political interference is one of the biggest stumbling blocks in the prosecution of the most serious crimes. The circumstances surrounding the suspension and firing of former NDPP Vusi Pikoli, and the dropping of charges against President Jacob Zuma, suggest that the somewhat circumscribed independence of the NPA has come under severe strain in recent years because of outside interference.

He also finds that the tendency to favour the ANC's interests has led to the increased centralisation of power in the executive and eroded the institutional capacity to counteract this centralisation. While these deficiencies do not amount to institutional

failure, there has been a deviation from the intended goals of the institutions, whose weaknesses have come under the spotlight.

As mentioned above, informal institutions are as important as formal ones in ascertaining the quality of a democracy. Not only is civil society an essential component of any democracy, it is also a barometer of its health, as it reflects the level of citizens' participation in decisions that affect their lives. Civil society acts as a conduit between citizens and decision-makers, so that citizens participate in the making of decisions rather than being mere recipients of them.

In chapter six, Steven Friedman provides a wide-ranging analysis of civil society in South Africa. Underscoring the relationship between civil society and democracy, he argues that the test of the health of a democracy is the degree to which all citizens participate in it. However, he cautions against assuming that civil society is the sole vehicle through which the citizen's voice can be heard. He spells out the limits of civil society in relation to its depth (representation of citizens) and breadth (representation of viewpoints), stating that "... the deeper and broader civil society, the healthier the democracy".

Friedman finds that although South African civil society incorporates a significant breadth of views, it lacks depth – that is, a major constituency among the poor. This he labels its "shallowness". Although it has fairly strong links with the government and in some instances can influence or alter government policy, civil society's shallow representation prevents it from adequately internalising the true needs of the poor.

Friedman's example of the shallowness of civil society in dealing with poverty reduction is particularly effective in capturing the relationship between poverty alleviation, civil society and government policy, and highlighting the interrelatedness between the development and democracy processes. Friedman argues that because civil society is insufficiently representative of its constituency, a mismatch has arisen between policy and the needs of the poor. Civil society organisations that deal with poverty issues are unable to act appropriately on behalf of the "voiceless" poor, leading to a disjunction between their needs and concerns and the policies devised to deal with them.

One of the most important points Friedman makes is the importance of constitutional democracy to the continued existence of civil society in South Africa. He alludes to the fact that civil society does not pay adequate attention to basic rights under the Constitution to act and speak freely, and pays little attention to matters such as the independence of the judiciary, a free media and the independence of academic institutions. These, Friedman argues, comprise the cornerstone of the democratic environment required for civil society to function effectively.

He recommends that civil society in South Africa should focus less on its relationship with government, and instead seek strategic openings to influence government decisions while building social alliances and creating a moral consensus in society.

100 Questions – Contextualising Idasa’s Democracy Index

In the second section of the book, we revisit Idasa’s Democracy Index, developed by Robert Mattes and Richard Calland. This is Idasa’s third attempt to assess the depth of democracy in South Africa using an index with 100 questions on democracy. While earlier versions of the Index used up to 150 questions, the 2005 Democracy Index, published in *Democracy in the Time of Mbeki*, edited by Paul Graham and Richard Calland, reduced the number of questions to 100. In the 2010 Democracy Index we retain the 100 questions used in the 2005 book. However, since each compilation of the Index has used a unique methodology to answer the questions, each set of results stands on its own and is not suitable for statistical comparison across years.

One of the main goals of the Democracy Index is to assess South African democracy on the strength of its proximity to a broad definition of popular self-government. We expand on this definition by posing the following three questions about democracy:

- To what extent does the political system in a particular country enable its citizens to build popular, accountable and sustainable self-government?
- To what extent can citizens influence and control those who make decisions about public affairs, including elected representatives and government appointees at all levels?
- To what extent do citizens enjoy equality with each other in these governance processes?

To enable the Index to tackle these questions, it is divided into five sections: participation; elections; accountability; political rights; and human dignity with each capturing aspects of the principles outlined above. The section dealing with participation evaluates the “popularity” of the democratic system – whether it represents the will of the people. Are citizens willing and eager participants in the democratic system, and do they accept collective decision-making under democracy? The elections section looks at whether South Africans are able to select the legislators and public representatives they want and how equal they are in this process. It interrogates the freedom, fairness and frequency of South African elections.

The section dealing with accountability seeks to assess the responsiveness of elected and appointed representatives in institutions between elections, and questions the degree to which South Africans can hold elected representatives to account outside elections. The political freedom section evaluates political rights and civil liberties in the country and the extent to which citizens can gain access to information, inform themselves, express views and engage other citizens and the government without fear of reprisal. Finally, the human dignity section deals with the extent to which citizens are excluded from participating in democracy as a result of poverty, unemployment and inequality, among other conditions. It attempts to understand how citizens can exercise control over decision-makers and, through them, over the development process, to ensure adequate socio-economic delivery.⁷

The Democracy Index is intended as a tool for unpacking and dissecting the details of democracy. It is designed to be accessible to a wide range of people, to stimulate debate and to provide a snapshot of the current state of democracy in South Africa – the key ideas, policies, legislation and practices, and citizens’ experiences of these – as a way of understanding the challenges the country faces. It is also intended as a reference guide for researchers, academics and analysts, a tool that assists in the advancement of the study of democracy. Section authors have provided extensive detail of case studies, papers, newspaper articles and government reviews, and these are captured in the endnotes.

Previous versions of the Index were written by people outside Idasa. However, this time we decided to ask external analysts and academics to write the chapters that provide a broad overview of democracy, while conducting research for the Democracy Index in-house, using a team of researchers and analysts from Idasa’s Political Information and Monitoring Service (PIMS). PIMS analysts were asked to provide a numerical ranking for each question, which should be seen as an individual assessment rather than a precise, scientific approach. The purpose of the scores is to ignite debate and help readers make their own assessments based on the information available.

The authors were asked to score each question between 1 and 10. We asked them to use the following guide: 1- 4 means inadequate or falling short of the democratic ideal; 5 stable but insufficient; 6 stable and adequate; 7 improving; and 8-10 excellent and as close to the democratic ideal as possible. Authors were also encouraged to weight their scores, differentiating between procedural forms of democracy and substantive access to rights and treating the latter as more important. Average scores at the end of the sections, and of the entire index itself, cloud the wide variations within and across sections and provide an indicative summary rather than a definitive grade.

Participation

In section one, Kate Lefko-Everett contends that, after 15 years of democracy, South Africans share a relatively high level of national identification and believe that the Constitution expresses the hopes and values of citizens. According to Lefko-Everett, there is relatively broad consensus that the identity of the South Africa “nation” is firmly grounded in the values of the Constitution, which includes the attainment of equality, human dignity, non-racialism, non-sexism, the rule of law and an accountable and responsive system of democratic governance.

However, Lefko-Everett presents significant evidence of deterioration over the past five years in aspects of South Africa’s democracy, including citizens’ confidence in government, the strength of public institutions, the integrity of political leadership and the overall health of democracy. This is placed in the context of a series of significant political events, starting with the 2005 dismissal of Jacob Zuma as Deputy President in response to allegations of fraud and corruption. In the ANC, this sparked a fierce political contest between Zuma, South Africa’s current President, and the former president of the country and the ANC, Thabo Mbeki.

Lefko-Everett notes that concurrent events in the public sphere – including the controversial disbanding of the elite crime-fighting unit, the Scorpions, criminal charges against Jackie Selebi, the National Police Commissioner, the dismissal of Vusi Pikoli, head of the NPA, and the NPA’s decision to withdraw all charges against Zuma – have cumulatively had a “destabilising effect, provoking insecurity among citizens”. Public opinion surveys reflect this worrying decline in “confidence around the health of South Africa’s democracy in practice”. According to Lefko-Everett, this decline has implications for citizens’ perceptions of the legitimacy of government and compliance with the rule of law.

Furthermore, while many citizens are interested in politics and governance, they also feel their “views and concerns are not sufficiently taken into account by elected representatives and ultimately, do not think they can have an impact on collective decision-making”. Citizens are, therefore, “increasingly articulating their concerns outside of formal or government-provided channels: for example, through the substantial rise in protests in recent years”.

Lefko-Everett suggests that levels of intolerance among South Africans are “worryingly high”, as evidenced in public assaults on women, gay and lesbian people, and immigrants and refugees. Immigrants, particularly those from African countries, have been the target of vicious attacks, particularly during the wave of xenophobic violence that swept South Africa in May 2008. She also suggests that “South Africans remain fundamentally distrustful of those around them”.

She concludes that the change in government presents an “opportunity for the new administration to reinvigorate engagement with citizens by, for example, dedicated efforts to improve opportunities for public participation and to demonstrate that citizen input is taken into account”. Nevertheless she cautions that “... enormous strides will be required to address the fundamental causes of current levels of citizen discontent, including perceptions around the pace of service delivery and greater transparency and accountability on the part of government”.

Elections

In section two, Justin Sylvester and Paulos Eshetu examine the country’s electoral system and its related institutions. Analysing the past four elections, they find that South Africa enjoys a strong electoral system that has delivered free and fair elections despite being a divided society with significant levels of political intolerance. In their view, much of this is due to the work of the Independent Electoral Commission and the consistently high levels of electoral participation by South Africans. They conclude that “... elections in South Africa seem to enjoy high levels of public trust and legitimacy – more so than most of South Africa’s democratic institutions”.

The section makes two other important points. The first is that although South Africa has a proportional representation system that promotes multiparty democracy, political parties appoint legislators based on a closed party list system. This means that rather than being accountable to citizens, national and provincial representatives are beholden to their political parties. The system fosters an environment in which

legislators are appointed more because of their political standing in their party than because of their expertise or performance as elected public representatives. This, the authors say, creates an “accountability deficit”.

Sylvester and Eshetu’s second argument relates to the funding of political parties. South Africa has no legislation that regulates the private funding of political parties, and this, the authors say, exposes the political process to corruption through election donations. Such an unregulated environment undermines the political influence of citizens by allowing private donors to trade donations for favours. The authors also point out that this creates opportunities for corruption in state institutions and state-owned enterprises, whose resources can be redirected to party coffers. Unregulated private funding creates a “transparency deficit”, the authors argue.

The authors call for the reform of the electoral system to allow for the direct election of legislators and their accountability to their constituents. They also call for the regulation of private political party funding, arguing that politics and capital converge in this unregulated space, often to the detriment of ordinary citizens who have little or no access to elected representatives. This, in turn, reduces the democratic space for citizens to engage and participate between elections, weakening their capacity to influence governance and policy.

Accountability

The starting point for Gary Pienaar’s discussion in section three is the need for continuing and multiple forms of accountability in a stable and thriving democracy. Pienaar contends that public officials should be accountable for their performance and dealings with the private sector to ensure that the central values of the democratic project – government of, by and for the people – are observed in practice.

The section considers the vitality and adequacy of institutions set up to promote and ensure accountability, including the prescribed role and actual functioning of Parliament as a lawmaking and oversight body which now has the power to shape the Budget. Pienaar examines the quality of public access to and participation in Parliament’s activities, access to the information essential to making accountability real and participation meaningful, the adequacy of institutional mechanisms to ensure ethical performance of public responsibilities, and the independence of other oversight institutions such as the courts and the media. He also briefly considers the government’s ability to influence the domestic policy environment.

Pienaar notes many disappointments, punctuated by encouraging affirmations of the value of vibrant democratic institutions. He surmises that while the 2009 elections were technically exemplary, the opaque relationship between political and financial power remains a central concern requiring urgent regulation. At critical points, choices have been made about leaders’ accountability that seem to be mainly driven by political considerations. These threaten to weaken vital institutions, such as the courts, the prosecuting authority and the presidency. The accountability of lawmakers

has been strengthened by the scrapping of floor-crossing legislation, but the loyalty of public representatives is largely to their parties, rather than voters.

Pienaar points out that greater vigilance will be required as Parliament exercises its new powers to shape the Budget. These will require close attention as legislators are increasingly exposed to lobbying and personal and partisan pressures, because of the weak regulation of their outside business interests and receipt of gifts. How Parliament deals with draft constitutional amendments that ignore Constitutional Court rulings or seek to change key features of the political settlement that underpins the Constitution should be similarly scrutinised.

Pienaar also states that the national legislature has yet to exercise effective oversight of public servants' performance, and has not intervened to ensure the enactment of draft legislation to remedy the continued absence of post-employment restrictions. He finds that much-needed legislation to clarify the ethical standards of the judiciary has been clouded by subsequent inaction over the details, and by fears prompted by politically coloured attacks on the judiciary and interventions in judicial appointments.

Pienaar concludes that the political system has not internalised the responsibility of public representatives to account for their actions and performance. The impression has been created that accountability is something that needs to be avoided rather than embraced as an integral part of a democratic system.

Political Freedom

In section four, Shameela Seedat affirms that the political freedoms guaranteed in South Africa's progressive Constitution – including freedom of expression and assembly, the right to participate in political parties and in civil society, and media freedom – are fundamental not just to participatory democracy, but also to individual human development. However, in reality, the enjoyment of political freedoms continues to be impaired by social and economic inequalities, since access to the government, courts, civil society and Chapter Nine institutions continues to be linked to resources.

Seedat recognises that the Constitution provides a valuable framework for addressing important questions relating to political rights. She regards such rights – including the freedoms of expression and assembly – as being highly relevant in contemporary South Africa and important for the advocacy of socio-economic improvements, particularly in the period of perceived political fluidity following the change in government leadership.

However, in addition to the problems of access noted above, she argues that the formal structures associated with political freedoms have not always been supported by constructive government action. She cites the case of the South African Broadcasting Corporation (SABC) which as public broadcaster should play an important role in providing information to assist people in making political choices, but which was susceptible to political interference in the period under consideration.

Other factors affecting the enjoyment of civil and political rights addressed by Seedat include the high levels of private violence, crime and xenophobia, concerns about the representivity of political parties, the level of public participation in government processes, and the “centralisation of power in the hands of the governing elite, especially where business and government interests overlap”.

While recognising that political freedoms cannot be reduced to purely constitutional and institutional considerations, Seedat nevertheless concludes that it is “essential for the maintenance of political freedoms that key institutions such as the courts and Chapter Nine institutions be run independently and progressively, and allow the widest range of citizens’ access”. She argues that even where citizens can exercise agency and use their political rights to bring about change, they must believe that their views and concerns are taken into account in collective decision-making processes.

Human Dignity

In section five, Justin Sylvester and Nonhlanhla Chanza assess South Africa’s democracy in terms of whether it gives citizens a dignified life, as provided for in the Constitution. The section interprets human dignity as encompassing key socio-economic rights, including the rights to basic needs and services, health care, education, poverty alleviation, fair treatment of labour, good corporate governance and the role of private business in the provision of services.

The authors point out that substantial progress has been made in delivering certain basic services since 1994. But although there have been significant improvements in rudimentary water infrastructure, the electrification of households and sanitation, challenges remain. Sylvester and Chanza state:

Questions have been raised around the quality, affordability and adequacy of services and the efficiency with which they are delivered. Further concerns relate to the perceived unequal distribution of services among communities. There is a growing concern that urban areas, larger towns and suburbs receive better or higher levels of service than semi-urban areas, rural communities and informal settlements.

As discussed in chapter three, poverty has declined since 1994, but the overall poverty rate remained high in 2005, at 48%. Sylvester and Chanza point to some of the government’s anti-poverty measures, including social grants and the extended public works programme, which have succeeded in targeting women. Malnutrition among children has also fallen dramatically, a development largely attributed to the government’s integrated nutrition programme.

Housing and land ownership are still among the government’s biggest challenges. Although almost 2.3 million housing units have been built since 1994, demand far outstrips delivery. Government housing programmes have come under attack for the poor quality of housing they provide, while slow delivery and poor spacial planning

relegates the recipients of public housing to peri-urban sprawl far from economic hubs. The pace of land reform has been equally slow. Although there has been some land restitution, only 4.8 million of the targeted 24.9 million hectares had been restored to claimants by 2008.

Public health represents one of South Africa's biggest crises. The authors outline the three major challenges facing public health: inequality between public and private care in terms of quality of service and per capita expenditure; the management and the provision of services in the public health system; and finally the HIV/Aids epidemic. It is estimated that five million South Africans are infected with HIV. Of the 1.5 million people in need of anti-retroviral treatment, just over half, or 800 000, were receiving treatment in 2009.

The education system also suffers from major deficiencies. While increased enrolment has been the main achievement of the democratic era, Sylvester and Chanza point to poor management, low teacher morale, decaying infrastructure and poorly planned and executed changes in the curriculum as major shortcomings of the system.

The authors also paint a grim picture of unemployment, which has a disproportionate effect on black people, women and youth. Particularly worrying is the real unemployment rate, which includes discouraged workers. Although the rate of real unemployment is down from a peak of 42.5% in 2003, it remained at 34.1% in 2009.

Concluding, Sylvester and Chanza point out that the idea of human dignity has been incorporated in procedural and legislative processes dealing with socio-economic rights. However, in practice the realisation of these rights is uneven and inadequate. Institutional failures, the continuing legacy of apartheid that is deeply entrenched in institutions and society, and the problems associated with citizens being treated as consumers and passive recipients of "delivery" have undermined the achievements.

The authors believe that what is missing in twinning human dignity and democracy is citizens' ability to demand their socio-economic rights by using democratic institutions. Democracy requires that citizens have access to, and, use democratic space to realise their socio-economic rights, rather than being passive recipients of delivery by the state.

The chapters at the beginning of the book and the Democracy Index suggest that South African democracy is developing slowly, stagnating in many areas and actually regressing in others. The overall picture is one of clogged wheels and significant barriers. While there have been advances in poverty reduction, HIV/Aids treatment, housing delivery and the provision of water and electricity, continuing high rates of poverty, inequality and unemployment remain a challenge for the future. A country with a real unemployment rate of 34% does not have the luxury of a long-term view of democracy. The current global recession continues to erode the economic security of citizens and worsen the material conditions of the poor.

In addition, the political instability created by factional battles in the ANC has contributed to an environment of uncertainty and caution. There is a widespread sense that events may take a turn for the worse if opportunistic tendencies are not contained. The weakness of institutions, xenophobic violence and the abuse of power by elected officials all indicate that the next few years will see considerable challenges to the quality and health of South Africa's democracy. An active civil society and a politicised citizenry are an antidote – yet a truly participatory democracy in certain respects feels as elusive today as it did in 1994.

Neeta Misra-Dexter & Judith February
Cape Town, March 2010

ENDNOTES

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Steven Friedman is director of the Centre for the Study of Democracy at Rhodes University and the University of Johannesburg. With a D.Litt from Rhodes University, he is a political scientist whose has specialised in the study of democracy. During the 1980s, he produced a series of studies of apartheid reforms and their implications for a democratic future. He researched and wrote widely on the South African transition to democracy before and after the 1994 elections and has, over the past decade, largely written on the relationship between democracy, social inequality and economic growth. In particular, he has stressed the role of citizen voice in strengthening democracy and promoting equality. He is the author of *Building Tomorrow Today*, a study of the South African trade union movement and the implications of its growth for democracy, and is the editor of *The Long Journey* and *The Small Miracle* (with Doreen Atkinson), which presented the outcome of two research projects on the South African transition. He is currently studying the role of citizen action in strengthening and sustaining democracy, with a particular focus on the activism of people living with HIV/Aids.

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Neeta Misra-Dexter recently completed her doctorate in development planning, with a focus on economic development, at the Massachusetts Institute of Technology. She holds a master's degree in international planning from Cornell University. She has studied poverty alleviation programmes such as food rationing and employment guarantee schemes in India. Most recently, her PhD research focused on the political role of trade unions in South Africa; this will shortly be published as a book. For the past year she has worked in the Political Information and Monitoring Service at Idasa. She will be undertaking a post-doctorate degree in the School of Economics at the University of Cape Town, researching inequality amongst households in three villages in the Eastern Cape.

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Carlene van der Westhuizen joined the Development Policy Research Unit at the University of Cape Town in February 2005 as a senior researcher. Her previous employers include Idasa's Budget Information Service, where she conducted pro-poor budget analysis, and the Western Cape Trade and Investment Promotion Agency (Wesgro). She holds an MA in economics from the University of Stellenbosch. Her research interests are labour economics, poverty and inequality

CHAPTER ONE

THE ONE-PARTY STATE AND LIBERATION MOVEMENTS IN AFRICA: LESSONS FOR SOUTH AFRICA

BY AUBREY MATSHIQI

Introduction

In June 2005 President Thabo Mbeki dismissed South Africa's then deputy president, Jacob Zuma, triggering a battle between the camps of the two leaders. In the same month, Zuma was charged with corruption following the conviction of his former financial adviser, Shabir Shaik, on fraud and corruption charges. In December 2007, at the ANC's national conference in Polokwane, Zuma beat Mbeki in the race for the party's presidency. In September 2008, the ANC removed Mbeki as head of state, and in April 2009 charges of corruption were withdrawn against Zuma, clearing the way for his inauguration as South Africa's president in May 2009.

Would these events have unfolded in the manner they did if South Africa had a more competitive party system? If the ANC had faced a real threat of electoral defeat, would it have recalled Mbeki before his term ended, and would it have risked fielding a presidential candidate facing criminal charges? If South Africa had a different electoral system, including direct presidential elections, would the ANC have handled its leadership battle differently?

There is no doubt that single-party dominance in South Africa informs the political choices of the ruling party and the quality of citizens' democratic experience. There is also no doubt that the democratic experience of citizens would be qualitatively different and far more substantive if the ANC did not benefit from weak opposition parties.

This chapter explores one-party states in post-independence Africa, giving no credence to the oft-repeated equation between South Africa and Africa's post-independence one-party states. But it will argue that single-party dominance or a dominant party system may have the same corrosive effect on democracy as one-party rule. Reinforcing this is the way in which the national liberation movement model

suggests a false congruency between the nation and the liberation movement, eliminating differences, including the right of political parties to compete in a multi-party system. In addition, the chapter argues that democracies become meaningful when attempts are made to bridge their procedural and substantive dimensions. It examines the threats that single-party dominance may pose to a country such as South Africa, relying in part on a brief discussion of such dominance in Botswana, Zambia and Zimbabwe. The chapter concludes that it cannot be assumed that a democratic reversal is impossible in South Africa.

For the purposes of our argument, we define the one-party state as a political order in which the political party system consists of a single political party. In some cases, one-party systems were created by legal proclamations that outlawed other political parties. In others, they were an expression of the political desires of an omnipotent leader. There have also been cases where a one-party state was the product of negotiations that led to the merger of the ruling and opposition parties, sometimes because of coercive measures against opposition parties, in other cases because of patronage or the weakness of opposition groupings.

As some contributors to the South African democratic discourse equate the post-apartheid party system with the one-party state, we should distinguish the two. In the literature, the concepts of single-party dominance and predominant party systems are used interchangeably, and this chapter uses them in this way. However, a predominant party system/single-party dominance and a one-party state differ in that the former involves a competitive party system, while the latter does not. We must also distinguish the one-party state from the no-party state, such as that decreed by President Yoweri Museveni of Uganda.

Heywood¹ characterises Africa's one-party state as a system built around the dominance of a charismatic leader. In one-party states, the ruling party has tended to be weakly organised, while the ideology of the state coincides with the leader's ideological preferences. In short, the ruling party and the state are personifications of the charismatic leader. In a similar vein, Heywood² argues that dominant party systems and one-party systems "may at times exhibit similar characteristics", adding that a dominant party system "is competitive in the sense that a number of parties compete for power in regular and popular elections, but is dominated by a single major party that consequently enjoys prolonged periods in power". South Africa's ANC, the Congress Party of India and the Liberal Democratic Party of Japan (now in opposition) are examples of single-party dominance in a predominant party system.

Friedman³ emphasises that predominant party systems are democratic, adding: "Insistence on this point is important for two reasons ... it distinguishes between systems in which, despite regular elections, party domination is achieved in whole or part by undemocratic means and those in which it is an accurate expression of the will of the electorate, expressed in democratic procedures." The ANC is a perfect example of single-party dominance as an expression of the will of the majority of voters. The higher-order question relates to the extent to which ANC rule resembles, or differs from, one-party rule. Some have tackled this question in terms of prospects

for democratic consolidation. While there is some evidence since 1994 of similarities between the ANC's single-party dominance in post-apartheid South Africa and the ravages of the one-party state, one cannot argue that the country faces an imminent threat of democratic reversal, nor that the single-party dominance of the ANC means that democracy in South Africa still remains to be consolidated⁴. In 2009, the author argued that:⁵

For others, the dominance of one party and the resultant absence of alternation of power mean that democracy cannot be consolidated. At best, this is a position that results from misconceptions about democracy or, at worst, is informed by value-laden ideological considerations. In other words, this conception of democratic consolidation precludes the possibility that factors other than the alternation of governing parties such as political culture may in the absence of, or together with, such alternation promote 'accountability' and 'responsiveness'.

Attempts at distinguishing between the one-party state and a predominant system with its characteristic feature of single-party dominance, in the context of debates about the one-party state in Africa, must take into account the fact that the Soviet Union was a one-party state and China is today still a one-party state. While some African despots may have modelled their party systems on the example set by China and the Soviet Union, the one-party state was certainly not an African invention.

The one-party state in Africa at a glance

In 1957, Ghana became the first sub-Saharan African country to attain independence from a European colonial power. Ghana's independence, and that of other African countries in the 1960s, brought to an end "the first wave of liberation movements" in Africa. During this, liberation movements fought for freedom from colonialism and, in South Africa's case, apartheid. Such liberation movements include Algeria's Front for National Liberation (FNL), the Popular Movement for the Liberation of Angola (MPLA), the South West African People's Organisation (Swapo) of Namibia, the Front for the Liberation of Mozambique (Frelimo), the Zimbabwe African National Union (Zanu), the African Party for the Independence of Guinea-Bissau and Cape Verde (PAIGC) and South Africa's ANC.

This was followed by the installation of post-independence regimes during Africa's "first wave of democracy", which was interrupted by dictatorships, one-party rule and military regimes. In many post-independence states, including Nigeria and Ghana, the bullet replaced the ballot. Keller reminds us that "by 1990, 60% of Africa's sovereign states had experienced military rule. Among the remaining civilian regimes, only seven countries had competitive party systems: Botswana, Gambia, Mauritius, Senegal, Swaziland, Namibia and Zimbabwe"⁶. However, it should be noted that Swaziland

is an absolute monarchy and that Zimbabwe has gone through a democratic reversal that, as we shall see later, was not atypical of Southern African Development Community (SADC) countries in the post-independence period of the 1960s. Keller further reminds us that in Africa, authoritarian rule generally came in two forms, military and one-party rule, and that the rulers tended to see their regimes as “developmental dictatorships”. On the continent and in the SADC region, independence elections were followed by relatively stable multi-party democracies, but from the mid-1960s, a shift towards one-party rule occurred, propelled by the need⁷ to focus attention on economic development, prioritise the imperatives of nation-building and reconciliation following decolonisation, and reduce the intensity of politics, perceived as divisive and inimical to the achievement of these objectives.

Tanzanian leader Julius Nyerere argued that “where there is one party and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be when you have two or more parties each representing only a section of the community”.⁸

In addition, an International Institute for Democracy and Electoral Assistance (IDEA) study points out that “the one-party regimes in the SADC region assumed two distinctive forms – *de facto one-party rule* and *de jure one-party rule*. With the exception of Swaziland, whose dominant political/dynastic elite has imposed authoritarian absolute monarchy, the majority of the independent SADC states embraced *de jure* [or *de facto*] one-party rule between the mid-1960s and the early 1990s. These included Angola, Malawi, Mozambique, Tanzania, Zaire (the present-day DRC), Zambia and Zimbabwe. Botswana and Mauritius have managed since independence to embrace and uphold a political culture of pluralism and political tolerance anchored on a relatively stable multi-party political system predicated upon liberal democracy.”⁹

IDEA argues that one of the main challenges facing political parties that are former liberation movements is “the bureaucratic-oligarchic syndrome”.¹⁰ This has tended to take the form of political parties in the region exhibiting autocratic hyper-bureaucratisation, while they are imbued with a culture of secrecy, as if they were secret societies. They also exhibit an oligarchic personality cult and the politics of patronage.

These tendencies reflect what happened elsewhere in post-independence Africa. During this period, the “one-man show” was invariably a precursor to the one-party state. It was not enough that the liberation movement and the nation became synonymous; the post-independence leader and the national interest became one. In Ghana, Kwame Nkrumah launched an ideology called “Nkrumahism” in 1960. According to Meredith, claims were made that this was based on scientific socialism and after four years of study, the Kwame Nkrumah Ideological Institute declared: “Nkrumahism is the ideology of the New Africa, independent and absolutely free from imperialism, organised on a continental scale, founded on the conception of One and United Africa, drawing its strength from modern science and technology and from the traditional African belief that the free development of each is conditioned by the free development of all.”¹¹ At face value, the vision was not problematic. However, the name given to the ideology betrayed what was to follow – the personalisation of the state. As Meredith

puts it, Nkrumah sought to create a united Africa with himself as leader and believed himself “to possess unique abilities”¹². Egypt also had its cult of personality – “Nasserism”, through which Gamal Abdel Nasser controlled Egypt. Meredith observes that “Nasserism was neither a movement nor an ideology but a system of personal rule. The organisation of the state and policy was determined by his will alone. All power was concentrated in his hands; every aspect of government came under his remit”¹³. Meredith¹⁴ says that Guinea’s Sekou Touré “deified himself in a similar fashion”, giving himself such titles as “Suprême de la Révolution” (his main title), “The Terror of International Imperialism, Colonialism and Neo-Colonialism”, “The Great Son of Africa” and “The Doctor of Revolutionary Sciences”. Also, Touré “was portrayed as an expert in every field, from agriculture to philosophy to soccer”. Hastings Kamuzu Banda regarded Malawi as “his personal fiefdom, demanding not just obedience but servility”. Meredith quotes him as saying: “Anything I say is law. Literally law. It is a fact in this country.” In similar vein, Félix Houphouët-Boigny of Côte d’Ivoire said: “Democracy is a system of government for virtuous people. In young countries such as our own, we need a chief who is all-powerful for a specified period of time.” Were these post-independence leaders lions or were those around them sheep? Perhaps the point is that these leaders, often supported by their political parties, hid behind nationalism and anti-imperialism to pursue a dictatorial and authoritarian agenda. Also the global milieu in the 1960s was not one of democratisation.

If one considers the veneration of Nelson Mandela in South Africa and the world at large, it is understandable that there were cases where there was a failure to separate the image of the heroic leader from the heroism of struggles fought by ordinary people in their quest for freedom. In these conditions, leaders of national liberation movements must have assumed a mythical status, as a result of which citizens were ill-prepared for their post-liberation lust for power. Non-South Africans may have seen Mandela as a selfless leader who departed from the examples of narcissism, corruption and autocracy set by leaders in countries that won independence much earlier than South Africa. But the blind loyalty shown to Jacob Zuma and Thabo Mbeki when the ANC was wracked by a leadership battle before the ANC’s 2007 conference suggests that South Africans may not be immune to the cult of personality.

In post-independence Africa, the cult of personality found expression in the one-party state. But, contrary to the common misconception, the one-party state was not always a product of authoritarian tendencies. For example,¹⁵ in 1959 Houphouët-Boigny’s Parti Démocratique de la Côte d’Ivoire won all Legislative Assembly seats by democratic means, while in Tanzania, Nyerere’s Tanganyika African National Union won all open seats in the 1960 parliamentary elections and Banda’s Congress Party won all seats in Malawi in 1964.

In other cases, one-party arrangements were arrived at through negotiations between ruling and opposition parties, either because of the latter’s weakness or threatened political extinction, or because senior opposition politicians wanted to benefit from networks of patronage. For instance, in 1957, Touré’s Parti Démocratique de Guinée won 56 seats in legislative assembly elections and concluded a merger with the

opposition in 1958. Six years later, Kenyan opposition politicians from the African Democratic Union crossed the floor and took posts in Jomo Kenyatta's government, while in Zimbabwe, the Zanu of Robert Mugabe and the Zimbabwe African People's Union (Zapu) of Joshua Nkomo merged in 1986 following the Matebeleland massacres of 1983.¹⁶ However, in countries such as Ghana, Niger, Togo and Burkina Faso, the one-party state resulted from the suppression of opposition parties. Some of the reasons for the adoption of one-party rule have been alluded to. The most eloquent justification came from Nyerere:¹⁷

The British and American tradition of a two-party system is a reflection of the society from which it evolved. The existence of distinct classes and the struggle between them resulted in the growth of this system. In Africa, the nationalist movements were fighting a battle for freedom from foreign domination, not from domination by any ruling class of our own. Once the foreign power – 'the other party' – has been expelled, there is no ready-made division among the people. The nationalist movements must inevitably form the first governments of the new states. Once a free government is formed, its supreme task lies ahead – the building up of the country's economy. This, no less than the struggle against colonialism, calls for the maximum united effort by the whole country if it is to succeed. There can be no room for difference or division.

There is much that is problematic, and probably emblematic, about this formulation, chiefly the irony of post-independence political elites mutating into authoritarian ruling classes. Nyerere falsely suggests that there were no social cleavages in pre-colonial Africa, superimposing the notion of the one-party state on the communal social relations of pre-colonial African societies. Secondly, his proposition lays the foundations for the elimination of differences in society and the outlawing of opposition political parties and other political opposition. The goals were noble, but the means (the one-party state) was decidedly not. Meredith remarks¹⁸ that the political parties of liberation ceased to be mass movements of the oppressed, leaving, as Frantz Fanon put it, "the shell, the name, the emblem and the motto".

As this chapter is partly motivated by concerns that single-party dominance in South Africa may impose conditions similar to those found in one-party states, consider the following pathologies of the latter. In the first place, patronage undermined the supremacy of parliament or the constitution. In this climate – in which parliaments, the public service and parastatals were packed with loyal party supporters, and appointments were made on the basis of party loyalty instead of merit – institutional certainty and the rule of law were compromised. Patronage, extended by "big men" at national, regional, district and even village level, led to the decentralisation of patterns of looting and created the basis for the corrupt award of government contracts and allocation of development projects. In addition, politicians used their positions to negotiate favourable terms with private capital for themselves, family members, personal friends and political allies, and were more concerned about private business deals than about the affairs of state and the interests of ordinary citizens. Meredith¹⁹

remarks that “political activity was seen by ambitious Africans as the most direct way of securing wealth and social standing”. Under these conditions it was inevitable that civil society formations such as trade unions became extensions of the one-party state and the media became a tool for government propaganda.

Such tendencies can become facts of political life even in countries considered democracies. In South Africa, contending conceptions of the one-party state have led some to argue that the country is exceptional and will not follow the typical post-independence trajectory of democratic reversal, while others hold that South Africa, as an African country, will inexorably slide towards reversal.

In what ways does the ANC’s post-apartheid rule recall the indicators of democratic reversal in post-independence Africa?

Perhaps the starting point is to remember that the conditions described above coincided with the Cold War and a global balance of forces or “world order” created by the bipolar contest for hegemony between the Soviet Union and the US. With the collapse of the Soviet Union in 1991, the global balance of forces changed in a way that dictated the form and content of the resolution of regional and sub-regional disputes. The ANC, robbed of its Soviet bloc support, and the apartheid regime, facing growing international isolation and a deepening crisis of legitimacy, was forced to accept that the reconfiguration of the global forces had imposed a stalemate requiring a negotiated political settlement. South Africa’s political settlement was modelled on the institutional imperatives of the liberal-democratic “second wave” of democratisation in Eastern Europe, Latin America and Africa. Because of these liberal-democratic impulses South Africa, after the democratic breakthrough of 1994, ended up with a conception of the rule of law and the supremacy of the constitution second only to a few states in the liberal-democratic world.

Although South Africa remains a model liberal democracy, certain similarities between the country and post-independence Africa are worth noting. Because of the proportional representation electoral system, parliamentary representatives are more loyal to party bosses than citizens – a feature of both the ruling and opposition parties. There have been many reports from within government, the media and the ruling party itself to suggest that patronage, corruption and the manipulation of tender processes have become a blot on the political landscape. Emerging as a major problem are tendencies that can be explained in terms of the ANC as a vehicle for capturing the state. Access to state and other resources depends on capturing the party by dislodging opponents, sometimes by nefarious means, posing a threat to the stability and credibility of state institutions. The judiciary and the National Prosecuting Authority have been among the casualties of the ANC’s internal battles. Of particular concern is the suggestion that state intelligence resources have been deployed in pursuit of factional dominance in the ruling party. Furthermore, it is widely accepted that the upper echelons of the public service are almost always reserved for party loyalists, and that local government is on the verge of collapse in some parts of the country, partly because appointments are based not on merit but on loyalty to the ruling party or a ruling party faction.

It is hardly surprising, therefore, that ruling party elites are among the main beneficiaries of patronage from the state and private capital. While the poor quality of opposition is largely due to the weakness of opposition parties, and the fact that the ANC is the main beneficiary of history, the ruling party's stranglehold on the public broadcaster has also played a role. In the period 1999-2008, this problem was worsened by the fact that the official opposition was largely ignored or treated as a nuisance or necessary evil. In a further move to weaken the opposition, the ANC merged with the New National Party, the ruling party during apartheid and the official opposition between 1994 and 1999, while Zuma has called for the ANC to merge with the Inkatha Freedom Party.

This raises questions about the ANC's commitment to promoting a plurality of political voices. In part, it is this that has fuelled the misconception that South Africa is a one-party state when it is a predominant party system. Nevertheless, concerns about the qualitative impact of pre-dominant party systems or single-party dominance on democracy are sometimes valid. Some commentators may be motivated by the racist belief that dictators and one-party states are part of the DNA of African politics. But this should not detract from the fact that democratic deficits could emerge in South Africa because internal contradictions in the ruling party may, in the context of single-party dominance, undermine the separation between state and party, harming the quality of the democratic experience of ordinary citizens.

Events between June 2005 and April 2009 have reinforced the Afro-pessimistic belief in the inevitability of democratic reversal in South Africa. For those who subscribe to this view, democratic reversals in post-independence Africa, the real and perceived impact of single-party dominance in South Africa, and the fact that internal leadership battles in the ANC between June 2005 and April 2009 posed serious threats to institutional certainty, seemed to constitute incontrovertible evidence of the inability of Africans to govern democratically. Some have even argued that South Africa may not be a *de jure* one-party state, but *de facto* exhibits many tendencies of the post-independence African one-party state.

Zimbabwe has been a powerful metaphor of reversal. As a result of the crisis there, we have seen a conceptual withering away of the border between South Africa and Zimbabwe, especially in the minds of Westerners, which makes many confidently predict that South Africa is going the way of its northern neighbour. The fact that the South African government has responded to the Zimbabwean crisis with "quiet diplomacy" is seen, particularly in the foreign media, as an expression of solidarity with a former liberation movement and now ruling party – Zanu-PF – that was the ANC's liberation struggle ally. The argument is often advanced despite historical evidence to the contrary. However, the perception may be correct to the extent that faced with a choice between supporting the opposition Movement for Democratic Change (MDC) – seen as a puppet of Western imperialism – and Zanu-PF, the South African government and a number of other SADC countries have tended to adopt a diplomatic stance that reinforces the imbalance of power between Zanu-PF and the MDC. This, in turn, has fuelled perceptions of a contradiction between South Africa's

democratic ethos and its commitment to creating conditions for a democratic order in Zimbabwe. The contradiction can, perhaps, be explained in terms of a deficit between South Africa's democratic ethos and the ANC's inconsistent record of turning this into a lived reality for citizens.

However, such a democratic deficit does not mean that South Africa is a one-party state. As we have argued, one must distinguish South Africa's dominant party system from the one-party state. Lodge characterises South Africa's dominant party system as follows:

One very demanding definition of democratic consolidation is that democracies only become mature when a ruling party in power at the democracy's inception is subsequently defeated in an election and allows the winners to take office ... Even if one allows that democracies can mature without such an alternation in office, in the South African case the objection might be that the formal institution of liberal democracy does not mean very much in a situation in which representative politics is overwhelmed by one large party and in which the prospect of any alternation of parties in government is rather remote. If that party is a nationalist movement that broadly represents a racial majority in a society which has a history of racial conflict and racial oppression, and if it represents the formerly oppressed group most closely, it might be argued that its supporters will be fairly uncritical or undemanding and that this leaves its leadership scope for plenty of misbehavior.²⁰

Without doubt, the scope for misbehaviour in the ANC has probably never been as great as it was in the months before and after the Polokwane conference. Speaking before the conference, Barney Pityana,²¹ principal of the University of South Africa and one of the key speakers at the 2008 national convention which preceded the launch of the Congress of the People (Cope), an opposition party formed by former ANC leaders, lamented the ANC's bruising leadership battle and echoed the views of those who were concerned about the impact it might have on institutional certainty. "From what I can observe," Pityana said, "it is not far-fetched to believe that South Africa could elect via the ANC a despotic and authoritarian leader masquerading as a populist." Since, at the time, there was fierce opposition from some in the mainstream media and among the "chattering classes" to Zuma's candidacy for the ANC presidency, it is safe to assume that the "despot" and "populist" Pityana referred to was Zuma. Pityana further argued: "Citizens have much to fear from our democracy today. There is a danger that unless we remain vigilant, we take responsibility for our future and we direct the course of our history as subjects and not mere objects of history, we will derive the democracy we deserve. Part of the maturing of our democracy must surely mean that we need to revisit our electoral system."

The majority of delegates at the ANC's 2007 conference, and, if support for the ANC in the 2009 general election is anything to go by, the majority of South Africans, did not seem to share Pityana's pessimism. In addition, he was echoing the sentiments

of many in the mainstream media and the chattering and middle classes, who saw in Zuma's election as ANC president a possible slide into conditions that would lead to a democratic reversal. The sensibilities of the media, the middle class and intellectual classes are not always representative of the mass of South Africans.

However, this should not detract from the fact that there are objective reasons to be concerned about the impact of single-party dominance on the quality of the democratic experience of South Africans. Single-party dominance and the gift of weak opposition parties has undoubtedly facilitated the "misbehaviour" of some leaders and members of the ruling party. The weakness of opposition parties means that they lack the capacity to perform the function of "agencies of restraint" that can prevent the excesses that come with single-party dominance. The implication is that the maturity of the country's democracy must be gauged by factors other than the alternation of power between political parties. In the absence of credible party political alternatives to the ANC, deepening the quality of citizens' democratic experience must in part depend on the development of a political culture that enables citizens to act as agents of restraint. Such a political culture should enable them to show respect for democratic institutions while displaying a willingness to transcend the limitations of our dominant party system. Unfortunately, South Africa seems to be a long way from achieving this.

The dominant party system is bolstered by the coincidence between electoral support and race. What is required is conduct by political parties that supports the emergence of a political culture that transcends the coincidence between political power and race. Of even greater importance may be extending the boundaries of South Africa's struggle heritage beyond the immutable idea of liberation as synonymous with the ANC holding political power, irrespective of how it is exercised. This, of course, is contingent on reconfiguring the liberation movement model in a manner that puts political power back in the hands of ordinary citizens.

The liberation movement model

It has been argued that one of the weaknesses of liberation movements is their failure to transform into political parties. Baregu²² argues that liberation movements, in a post-liberation setting, face the dilemma of straddling the pre-liberation and post-liberation periods, and at times an inability to grapple with the differences between a liberation movement and what some call a "modern" political party. He lists the differences between the two, which include:

- The liberation movement expresses the grievances and represents the aspirations of a country's oppressed majority, while the political party in power articulates and aggregates the interests of all citizens.
- The liberation movement makes many promises to mobilise popular support, while the political party in power has to "walk the talk".

- The liberation movement is relatively highly hierarchical and secretive, while the political party has to be more open, egalitarian and relatively populist.
- The liberation movement is intolerant of open dissent among members, since that can be divisive, diversionary, or both, while the political party must be democratic, compromising and allow free debate among members.
- The liberation movement is normally a banned organisation at home and has to organise from outside, meaning that it has the dual character of the external and internal wings, which may not always be in harmony. The political party is “on the ground” and has the task of unifying the two wings to form a coherent and relatively consensual whole.
- Decisions in the liberation movement are centred on its different committees under the general rubric of democratic centralism. Decisions in the ruling party are decentralised and split between the government (cabinet), the parliamentary party, the party headquarters (the central committee) and branches.

These differences pose challenges to former liberation movements, both at a conceptual level and in the realm of practical politics. Given that a former liberation movement must go through a period when it must govern a country while its historical mission of liberation is incomplete, is the distinction between a liberation movement and a political party always helpful or material? This has implications for our conception of the orientation of the ANC in a post-apartheid era, but is even more relevant to the tactical choices the ruling party must make in what it calls “the current phase of the National Democratic Revolution”. It seems a former liberation movement must pass through a phase when it has to adopt a complex identity to achieve the different ends dictated by the incompleteness of its historical task. The challenge is to determine when reliance on the liberation movement dimension of its identity is no longer in its interests. Before that point, it must manage the unavoidable tensions between different aspects of its identity, the most immediate challenge being to avoid situations where different dimensions of its identity are used to pursue narrow factional and personal goals. An example was the use of state resources by exile, underground and guerrilla networks in the post-apartheid state to pursue factional agendas in the battle between the Zuma and Mbeki camps.

These caveats notwithstanding, the author is persuaded by the ANC’s argument²³ that “the distinct feature of the post-1994 period is that the ANC is at once a national liberation movement and a ruling party”, and “that the choice for the ANC is not to transform itself into a narrow electoral or parliamentary party”. In fact, the ANC’s identity is more complex than a hybrid between a national liberation movement and a ruling party. Depending on what it has to achieve and what is demanded by the Constitution, it behaves like a modern parliamentary party, a social movement, a liberation movement, and in the transition period between the Mbeki and Zuma presidencies, it sometimes behaved like an opposition political party. In Suttner’s analysis, the ANC is a liberation movement based on the liberation movement model. He remarks that²⁴ “in the name of building unity, various ethnic movements were suppressed and a variety of complex forms and identities, in which people saw

themselves, were not allowed to find outlets in the political arena". He also argues that the ANC as a liberation movement, and allied organisations such as Frelimo, spent decades in an atmosphere of intolerance of regionalism and ethnic difference on the African continent. They also absorbed Marxist-Leninist notions, which converged with the national liberation movement model in stressing the need for a centralising, co-ordinating party".²⁵ In addition, "national liberation movements engaged in wars of liberation also claimed and often received recognition as the sole and authentic representative of particular peoples".²⁶

According to Suttner, this had two consequences – firstly, that the "quality of being the nation, which was ascribed to or claimed by the parties that led countries to independence, became one of the bases on which one-party states were advanced and opposition parties systematically suppressed",²⁷ and secondly that this "became one of the reasons why national liberation movements turned ruling parties were reluctant to consider exiting from government, as in contemporary Zimbabwe".²⁸ In an apparent warning to the ANC, Suttner argues that "neither the ANC nor any other political party or organisation can ever be equated with the nation, no matter how popular it may be. There are interests within the nation that require representation outside of the national liberation movement. The consolidation of democracy in South Africa is not the task of the ANC as majority party alone." He adds that "it is essential for the consolidation of democracy that pluralism be embraced in both the narrow constitutional and electoral sense of multi-party democracy, and in encouraging the formation of a variety of independent organisations representing a range of social interests – outside the ANC".²⁹

ANC leaders have often argued that the ruling party is "a parliament of the people", suggesting that "the people" belong to this parliament and are invited to claim their ownership of the movement. However, citizens seldom experience this, because the electoral system marginalises their interests and defers to those of the party and party leaders.

This chapter has argued that the post-independence experience of ordinary Africans has been characterised mainly by *de jure* or *de facto* one-party states and a liberation movement model that conflates the post-independence ruling party and the nation. Botswana, Zambia and Zimbabwe all exemplify this phenomenon.

Botswana

The Botswana Democratic Party (BDP) has been in power since independence in 1966. Despite this, argues an IDEA study of party systems in the SADC, the country is regarded as "the longest-enduring and most stable liberal democracy in Southern Africa".³⁰

It is unclear why observers tend to be less critical of single-party dominance in Botswana than they are of the ANC's dominance in South Africa. The answer may lie in value-laden perceptions about the ideological threat the ANC and its left-wing

allies pose to prospects for democratic consolidation. In a sense, however, South Africa has experienced single-party dominance for much longer than Botswana, if we take into account the fact that the apartheid-era ruling party, the National Party, was in power between 1948 and 1994. But this still does not explain why 15 years of single-party dominance since 1994 elicits more concern than 43 years of such single-party dominance in neighbouring Botswana.

As in South Africa, the BDP's dominance was achieved by democratic means and is an expression of the will of the majority. The IDEA study notes that "the dominance of the BDP has been reproduced over time by the political advantage it enjoys as the ruling party, including its access to state resources, which are used shrewdly by the ruling elite to help the party gain political advantage, especially during elections".³¹

The BDP also benefits from a weak and fractured opposition. Like South Africa, Botswana lacks what some scholars call "substantive uncertainty". In a country where election results are seldom certain, the level of substantive uncertainty is high, but countries such as Botswana and South Africa lack such uncertainty. As argued earlier, weak opposition parties such as the Botswana National Front (the official opposition) and the lack of substantive uncertainty mean that opposition parties cannot act as agencies of restraint. As in South Africa, Botswana's opposition parties have tried to unite and challenge the ruling BDP's dominant position, but without result. As in South Africa, it seems that credible opposition can only come from tensions within the ruling party spiralling out of control. But according to the study, which cites local political scientists, factional battles are worse in the opposition than in the BDP.

Also advantageous to the BDP and disadvantageous to the opposition is the "first past the post" (FPTP) electoral system. The IDEA study argues that to redress the deleterious effects of this on parties and the party system, "Botswana may have to review its electoral system and undertake necessary reforms. Botswana may be better served by the ... multi-member proportional system than by its current system".³²

Zambia

Zambia attained independence in 1964, and flirted briefly with multi-party democracy thereafter. Neo Simutanyi, cited in the IDEA study, notes that "Zambia has a brief history of multi-party politics. During the first parliamentary period (1964–1968), there were three political parties represented in the National Assembly."³³

In 1972, the country adopted a *de jure* one-party system. Ironically, this enjoyed some popular support for a while, and elections were even held – although only one party, Kenneth Kaunda's United National Independence Party (Unip), participated.³⁴ However, after almost a decade of social unrest sparked by the one-party system, Zambia returned to multi-party politics in 1991 when Frederick Chiluba's Movement for Multi-party Democracy (MMD) defeated Unip in a democratic election. Since 1991 the MMD has been the dominant party.

The IDEA study notes that “this clearly puts Zambia in the group of SADC member states that are characterised by a dominant-party system,”³⁵ and argues that, as in Botswana, the “FPTP system that Zambia adopted and has used in all its elections has not helped the institutionalisation of a robust party system”.³⁶ Despite the appointment of a presidential commission in 2004 to make recommendations on electoral reform, the government has shown very little appetite for change.

Zimbabwe

Zimbabwe, which became independent in 1980, is one of Africa’s most spectacular examples of democratic reversal. Like Zambia, its post-independence period was first characterised by a flirtation with multi-party democracy until 1986, when Zanu and Zapu merged. From 1987, Zimbabwe became a de facto one-party state.

According to Muzondidya, the main challenge facing Zanu-PF in 1980 was “nation-building in a society deeply divided along the lines of race, class, ethnicity, gender and geography. The other main challenges included post-war reconstruction, restructuring the inherited colonial political economy – especially redressing its racialised imbalances – and democratising the inherited authoritarian colonial state and its institutions”.³⁷ Unfortunately, the summer of democratising authoritarian colonial institutions gave way to the current winter of democratic reversal. Says Muzondidya:

Although multi-party elections were held regularly throughout the 1980s and 1990s, their organisation betrayed the government’s lack of tolerance of political diversity and commitment to democratic politics. Zanu-PF approached elections as ‘battles’ and viewed its political opponents as enemies to be annihilated rather than as political competitors. Its electoral dominance was partly achieved through its Gukurahundi strategy, which entailed an undisguised, intolerant, commandist and deliberately violent policy towards the opposition.

He also notes that “the party marshalled state resources and institutions, such as the army, police, intelligence services, and public radio and television, to ensure its electoral hegemony”.³⁸ According to Raftopoulos, Zimbabwe entered a period of upheaval in the 1990s that “consisted of a combination of political and economic decline that, while it had its origins in the long-term structural economic and political legacies of colonial rule as well as the political legacies of African nationalist politics, exploded onto the scene in the face of a major threat to the political future of the ruling party”.³⁹

The IDEA study argues that “the behaviour of the ruling Zanu-PF towards both opposition parties, especially the MDC (Movement for Democratic Change), and other non-state political actors such as civil society organisations, bears all the hallmarks of a one-party political culture, where criticism of or political challenges to officialdom are considered heretical at best and treasonous at worst”.⁴⁰

Until 2008, the opposition in Zimbabwe was weak, but in the March 2008 elections, the MDC won the majority of parliamentary seats and its leader, Morgan Tsvangirai, garnered enough votes to force a presidential run-off election against the incumbent, Robert Mugabe. Tsvangirai pulled out of the run-off because the Zanu-PF government made it impossible for a free and fair election to be held. The MDC could have done even better had the party not split in 2005, with a faction under Arthur Mutambara hiving off.

As in Botswana and Zambia, the FPTP electoral system has worked to the advantage of Zanu-PF. Currently, the two MDC factions are part of a coalition government with Zanu-PF based on a “global political agreement” sponsored by the SADC, whose provisions Zanu-PF violates at the slightest provocation in the knowledge that the repressive power of the Zimbabwean state and the inability of the two MDC factions to mobilise the required popular resistance favour Mugabe and his party. Comments Raftopoulos: “While a formal political agreement was established at the beginning of 2009, the political and economic challenges that confront the country were formidable. Amongst the most urgent was the task of building new, more tolerant forms of citizenship and nation, as the millions who had been subjected to the brutishness of Zanu-PF’s politics of sovereignty yearned to add democratic credentials to that notion.”⁴¹

Democracy: conceptual issues

In 2009, the world celebrated the tenth anniversary of the fall of the Berlin Wall, which in 1989 heralded the imminent collapse of the Soviet empire and what some hailed as “the end of history”. Up to that point, many had understood history in terms of the grand ideological battle between communism and capitalism, and the collapse of the Soviet empire was seen as the final victory of the market over the centralised state and economic planning and the victory of the liberal (and neo-liberal) democratic ideal of government. This ushered in the second wave of democracy in Africa and third waves of democratisation elsewhere in the world. In South Africa – a country where capitalism and democracy did not coincide – the wave of democracy resulted in the collapse of apartheid and the advent of democratic rule in 1994.

South Africa straddled, and perhaps continues to straddle, Western and African political realities because of its history of colonialism and apartheid, which produced conditions for anti-colonial and liberation struggles similar to those elsewhere in Africa. However, because of its loss of social, political and economic rights, the black majority became and remains a cultural minority. The white minority, whose interests were hegemonic during the colonial and apartheid periods, is still a cultural majority. The interests of the majority and elements of the minority group may converge, and cultural minorities and majorities are not always configured along racial lines – factors such as class and gender can import some fluidity.

This section seeks to make the point that conceptions of democracy are not valueless or non-ideological. The values of global, regional and national cultural majorities determine the dominant conceptions of what constitutes democratic reality. Since the end of the Cold War, the democratisation discourse has been dominated by the view that liberal democratic political and economic ideals represent the end of human evolution and civilisation. Debates about prospects of democratic consolidation in South Africa are coloured by ideological preferences that seem unable or unwilling to accept that the liberal-democratic model is one of a range of possibilities.

Margaret Ng argues that the “need” for democracy is based on a perception of human nature; democratic systems affirm, and are morally compatible with, an affirmation of the autonomy of human beings.⁴² The implication is that debates about the future of democracy in Africa and South Africa must take into account that they are part of a broader battle between contending perceptions of what constitutes the good society. In South Africa, perceptions of democracy are shaped by historical forces that created a dynamic of racial inclusion/exclusion. This continues to shape largely racialised expectations of what the post-apartheid democratic order should deliver. There is, therefore, a coincidence between race and expectations, which has, in turn, produced the coincidence between race and election results since 1994.

It is, therefore, not surprising that some of the beneficiaries and victims of apartheid may have different understandings of what democracy is and should be. These factors will, in part, determine voters’ electoral choices, as voting for the ANC or the opposition Democratic Alliance may boil down to a choice between different, or even conflicting, ideas about democracy. Attempts to define democracy in the South African context is more than an academic exercise. If the definitions we settle for help to bridge the racial divide, this could assist in the creation of a progressive post-apartheid political culture.

Przeworski argues that “democracy is a system in which parties lose elections. There are parties: divisions of interests, values, and opinions. There is competition, organised by rules. And there are periodic winners and losers.”⁴³ This emphasises the centrality of the multi-party system in mediating “divisions of interests, values and opinions”. Because of South Africa’s racial, class, gender, cultural, gender and other divisions, we must recognise that, as Bogaards⁴⁴ puts it, that political parties “link society and government” by aggregating social cleavages, translating social cleavages into political cleavages, and blocking the politicisation of social cleavages. In this regard, South Africa is not unique. Many post-independence African countries grappled with social cleavages such as those of ethnicity, religion and class. Przeworski’s definition, that “democracy is a system of processing conflicts”,⁴⁵ accords with such thinking. The challenge, therefore, is to diminish the importance of race as a social cleavage that could become further politicised. South Africa suffers from racial and class divisions, but there seems to be some convergence on what democracy must deliver.

In the first place, democracy must be the antithesis of apartheid authoritarian rule. As Ng remarks:

*Liberal democracy has its origins in a concept of the individual and his or her relationship with other human beings and with the state. If the individual is viewed as having inborn and inalienable rights, a government that restricts any of these rights can be justified only on the basis of consent. From here it is but a short step to democracy as the only legitimate – and in fact the only safe – form of government.*⁴⁶

By emphasising respect for the individual, this formulation is consistent with the black majority's experience under white minority rule. Apartheid rule signified a loss of human and political rights and a denial of full and inclusive citizenship, so our conception of democracy needs to be substantive, both conceptually and in terms of the lived reality of citizens in post-apartheid South Africa. Ng adds that "democracy has come to embody the individual's right to participate in government and thus to influence the process by which his or her own life can be determined".⁴⁷ Boron conceives of democracy in terms of three conditions.⁴⁸ Firstly, it "requires a social formation in which a given level ... of material welfare and fundamental equality have been achieved, thus allowing for the full development of unique individuals and a plurality of expressions of social life". Secondly, it "implies the effective enjoyment of freedom by the citizenry, a freedom that has to be not only a formal entitlement but a living and practical day-to-day experience rooted in the main features of a given society". Thirdly, it is "the existence of a complex set of unambiguous institutions and rules of the game able to guarantee the relatively uncertain outcomes that characterise democratic states". Three things flow from this with regard to the deepening of the democratic experience of South Africans:

A plurality of socially constructed expressions such as freedom of expression, media freedom, freedom of association and freedom of choice;

- Bridging the gap between the procedural and substantive aspects of democracy; and
- Institutional certainty.

This approach calls for the celebration and nurturing of differences and the prevention of a situation where groups feel "ruled out" of policy processes. It also requires us to embrace tensions that may arise between formal (institutional) and informal political spaces, and to embrace the interaction (or tension) between socially constructed political expressions such as respect for culture and traditional leadership and formal democratic institutions. As argued earlier, it calls for a deeper understanding of what democratic consolidation means and demands. This recognises that formal institutions alone will not lead to the consolidation of democracy, if we understand this to mean the participation of social movements and organs of civil society in democratic processes.

As we argued earlier, the equation of post-apartheid South Africa and the post-independence African one-party state is sometimes disingenuous and diverts us from the real challenge of deepening the South African democratic experience. As Lumumba-Kasongo puts it:

*Democracy is more than formal political pluralism or the process of producing an electoral code or an electoral commission ... Democracy is both a process and a practice that involves equal economic and social opportunities for the citizenry. It is a corrective process in which a given society, especially a formerly colonised society, is born again ... it is a ritual processing of new ideas and policies in a given society.*⁴⁹

Can the post-apartheid state perform this corrective function? Failure to do so would not only threaten the ruling party's position – it would also alienate the victims of colonialism and apartheid from democratic processes and institutions, eroding the legitimacy of the democratic state and the idea of democracy itself. This, Boron remarks, would give rise to a situation “where democratic arrangements are increasingly perceived as political rituals deprived of any relevance to the everyday life of the citizenry”.⁵⁰ He goes on to argue that “the popular devaluation of democracy goes hand in hand with an analogous downgrading of politics, seen as a selfish game played by professional and corrupt politicians and wealthy and powerful notables with total disregard for the common citizen”.⁵¹ The post-apartheid democratic state must give effect to both institutional certainty and the promise of a better life for all citizens. It is not enough for it to differ institutionally from Africa's post-independence one-party state. Its main challenge relates to giving substantive content to the democratic experience of socially and economically marginalised citizens.

Lessons for South Africa

There is nothing exceptional about being South African. The bad things that have happened elsewhere in Africa will happen here if political actors abuse democratic institutions because their hegemonic position seems unassailable. When members of the ruling alliance are bent on capturing the state for ends that have little or nothing to do with improving the conditions of the poor, we should be seriously concerned about the future of the country's democratic project. The capturing of the ANC en route to capturing the state in pursuit of narrow political and economic goals could create conditions for a gradual erosion of the democratic gains since 1994. There was nothing miraculous about the advent of democracy in South Africa – shifts in the global and regional balance of power conspired to support local political forces. These occurred in part because of human agency, and where human agency exists, both progress and reversal are possible. South Africa is not a one-party state, but this is cold comfort given that single-party dominance can have an equally pernicious effect on democratic institutions and the quality of the democratic experience for ordinary citizens if it erodes the political morality of the ruling party. South Africans should be concerned about the impact of leadership battles in the ANC on democratic institutions such as the judiciary, the public broadcaster and the intelligence services. There should be no complacency about our dominant party system, which together with the electoral system, reinforces the effects of a lack of “substantive uncertainty”. The

problem is that prolonged periods of single-party dominance could one day coincide with institutional uncertainty.

While it is not a given that single-party dominance will yield undemocratic outcomes, a few areas of concern are worth noting:

- Single-party dominance could compromise the independence of Parliament and the separation of powers, as parliamentarians tend to be more accountable to their party than to citizens.

As a result, public participation processes could be reduced to a side-show.

- Single-party dominance, and the shielding of the ruling party from electoral swings to the opposition could have a negative impact on service delivery and the quality of parliamentarians, cabinet ministers and senior public servants.
- Single-party dominance could promote a culture of corruption and impunity among public representatives.

If access to political power through a dominant political party is seen as the means to other ends, a dangerous confluence of political, business, criminal and intelligence interests could emerge.

- Single-party dominance could blur the lines between the state, society and the dominant party.

As the dominant party in economically depressed regions is the main or only instrument for the creation of a middle class, leadership contests in the ruling party could become violent and undermine peace and stability, locally and nationally.

- The dominant party could become the vehicle through which public policy choices are intended to serve the private interests of political and business elites.

The ANC is not oblivious to these possibilities. In a 2007 discussion document, it said:

In the end, political organisations are about gaining access to political power and using that power to change society in line with its goals and mission. However, as we seek to transform and use power, it also impacts on individuals and the political organisation that is in power. Many popular movements and parties end up getting isolated from their social bases when they are in power ... Ruling parties are afflicted by problems such as corruption, careerism, patronage etc. The management of the relationship between the party and the state can also create serious challenges unless the party is appropriately structured and properly resourced to give leadership to its cadres in all spheres of society.⁵²

The ANC's 2007 leadership battle occurred in the context of a serious failure at the top leadership level. Equally problematic was the fact is that the party was saved from electoral defeat, despite its inglorious handling of the leadership battle, because of the weakness of opposition parties. Unfortunately, our democratic institutions were not so lucky and may not be out the woods, as another leadership battle appears to be looming at the ANC's 2012 national conference.

Fortunately, liberation in South Africa was achieved long after the success of freedom struggles in India, Africa and Latin America. In India, the Congress Party has had to learn that the oppressed, the “motive force” of struggle, can exercise their free political will at the expense of the dominant party when decades of single-party dominance produce a social distance between them and the movement that formerly fought for their freedom. As in India, Nicaraguan voters supported the Sandinistas after the struggle for freedom but ejected them from power when democratic deficits emerged.

The fact that voters in Nicaragua and India later returned the two parties to power is an important lesson for the ANC. As they say in Zulu, *okungapheli kuyahlola* – nothing lasts forever. The ANC must work to modernise and deepen the democratic content of its internal space, and ensure that it bridges the gap between the governed and those who govern. Otherwise, the majority of ordinary South Africans may also deepen their democratic experience by deciding to exercise their free political will.

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THE DEVELOPMENTAL STATE AND POST-LIBERATION SOUTH AFRICA

BY SAM ASHMAN, BEN FINE AND SUSAN NEWMAN¹

*The developmental state will play a central and strategic role in the economy. We will ensure a more effective government; improve the coordination and planning efforts of the developmental state by means of a planning entity to ensure faster change. A review of the structure of government will be undertaken, to ensure effective service delivery.*²

*If we look deeply into the configuration of the new Jacob Zuma Cabinet, SA is on the way to becoming a developmental state.*³

*In this context (a programme for transformation), the state should be transformed into an effective and democratic developmental state.*⁴

*Consolidating a developmental state has become a unifying project within the ANC alliance. It is a commitment rooted not in dogma but in experience.*⁵

Introduction: South Africa and the developmental state – looking forwards or backwards?

Scholars applied the term “developmental state” after the event to encapsulate the post-World War II experience of growth and development in successful East Asian newly-industrialised countries (NICs). Contemporary South Africa, by ironic contrast, is unique in that the term has been taken up in a variety of different ways as a positive political project to be achieved in the near future. If such a thing is not already in existence, it is hoped that it will soon be.

The ANC announced its intention of achieving a developmental state in a discussion document⁶ that criticises the pro-market policies of the Washington Consensus – which the ANC government had itself pursued since the adoption of the Growth, Employment and Redistribution (Gear) macro-economic policy – for failing to bring about economic development. Reference is made to the US-funded Marshall Plan for reconstructing post-war Europe, the experience of the East Asian NICs and the European Union as examples of successful economic development in the 20th century. This was to inspire a flurry of articles and discussions that continue unabated.⁷ The yearly *State of the Nation* edited collections carry a dedicated chapter on South Africa as a developmental state or reflect on it in the introduction. Briefing papers have been produced by organisations across the political spectrum, from the Congress of South African Trade Unions (Cosatu) to Sanlam, while academic conferences have been held on the topic, probably with more to come.

While the adoption of the term “developmental state” was part of a deliberate strategy by the ANC leadership to dabble in intellectual authority and historical precedent, it solicited a wide-ranging and considered approach and failed to save Mbeki’s discredited policies and associates in the face of widespread anger and frustration at the lack of change and achievement since the demise of apartheid.

Despite its peculiar origins, the developmental state debate has survived Mbeki. Indeed, it has been strengthened by the transition to Jacob Zuma’s presidency and a widespread desire for a move away from neo-liberal policies towards greater emphasis on economic and social reform in the interests of the majority. This is despite the fact that Zuma himself has never disavowed the neo-liberal framework that he inherited and has repeatedly said that there will be no major shifts in policy.

Despite this contradiction, and a lack of clarity about how the South African developmental state will emerge and what it will comprise, for those in the ruling alliance who seek change, the term continues to gain currency. Perhaps the simple appeal of the concept is that it can be used to justify greater state intervention.

No doubt there has been a shift in the language used in much of the debate. But this chapter will argue that South Africa has a long way to go before it begins to resemble a developmental state. Paradoxically, like its East Asian counterparts, South Africa was in many respects nearer to being a developmental state at points in its anti-democratic past – without the benefits of realising this.⁸ The chapter also suggests that while the developmental state paradigm and the related literature may offer insights into the role of the state in (East Asian) industrialisation, it is a flawed approach in understanding state-society relations – and state-market relations in particular – because of its unwarranted separation of the economic and the political as an analytical starting point and guiding thread, and because of the corresponding lack of attention and priority it gives to the class forces that underpin the role of the state and market and their interaction.

So despite offering some potential for formulating progressive policy, the developing state paradigm is limited in its approach, in principle and especially in practice – not

least because no state ever knew in advance that it was “developmental”! This leaves open the role that the developmental state concept will play as a focus for political mobilisation, policy-making and debate, not least because its substance remains contested, particularly in South Africa.

We begin by exploring the literature on the developmental state, arguing that whatever insights it has generated, it is marred by a separation of economics and politics, not least by accepting a duality of state and market. Secondly, we suggest an alternative approach for South Africa – that the country remains dominated by what has been called its “minerals-energy complex”.⁹ This complex has changed over time, but is still critical to understanding relations between capital and the state in South Africa and the country’s overall pattern of industrial and social development. Thirdly, we look at the trajectory of economic development and policy in South Africa since apartheid, highlighting its neo-liberal nature and the absence of features considered critical for the success of the developmental state paradigm. South African capital in the post-apartheid period has substantially internationalised and financialised its operations, and in doing so has been systematically aided by state policy. This has emphasised “macro-economic stability” and trade and financial deregulation at the expense of, and in conflict with, social and economic reform. There is a marked contrast in South Africa between the widespread discussion of the term “developmental state” and the absence of such a phenomenon in reality. More radical policy measures will have to be adopted if the country’s pattern of lack of development is to be broken.

The political dimension of state capacity is generally discussed in terms of state autonomy – the state’s independence from, or predominance over, class interests, as opposed to how it reflects them. The developmental state paradigm has focused on the state’s ability to act against private economic and other interests in bringing about development. As a result, there has been a debate about a trade-off between democracy and developmentalism, based on the autocratic developmental states of East Asia. Indeed, authors such as Chang¹⁰ have noted that the changing context of the global economy, with the rise of neo-liberalism, democracy and modernisation, has held back the emergence of developmental states.

While state autonomy is often presented as a precondition for the developmental state, studies have tended to give shallow accounts of the social, political, cultural and ideological circumstances that create such preconditions and allow them to prevail over other causal factors and interests.¹¹ However, despite claims of the necessity of “state autocracy”, effective state interventions at national and sectoral levels have occurred in democratic contexts. These have included the Indian software industry (despite false claims that its success flowed from neo-liberal policies or free market forces) and many other sectors in Latin America, South East Asia and the developed world.¹²

The autocracy versus democracy debate in the developmental state literature has been misleading. It has arisen because the state and market are viewed as separate and competing, with the state having to prevail over the market to effect change.

The developmental state paradigm: a false separation of state and market

US academic Chalmers Johnson coined the term “capitalist developmental state” to describe the nature of the Japanese state between 1925 and 1975 and, in particular, to highlight the powerful role of Japan’s Ministry of International Trade and Industry (MITI) in the country’s post-war economic development.¹³ At the height of its influence in the 1950s and 1960s, the ministry ran Japanese industrial policy, encouraging the development of nearly all of Japan’s major industries. Johnson extended his argument to say that “the Japanese, Koreans and Taiwanese have put together the political economy of capitalism in ways unprecedented in the West and with quite different trade-offs (greater performance but less political participation)”.¹⁴

However, the idea that the state can, should and does play a central role in capitalist and industrial development is much older. It can be traced back at least to Alexander Hamilton, writing in the United States in the late 18th century, and Friedrich List, an early 19th century German. List is often credited with having first developed the argument for the protection of infant industries in newly industrialising countries seeking to catch up with competitors. The developmental state paradigm was taken forward in the import-substituting industrialisation policies pursued by Latin American countries under the influence of Dependency Theory. The developmental state literature has since acquired its own content and flavour, influenced by the more recently mixed fortunes of the east Asian NICs and Japan, and has changed its focus from an exclusive preoccupation with industrialisation.¹⁵

Johnson’s reflection on the nature of the state and development must be seen as part of the West’s Cold War struggle with the Eastern bloc. At that time, he was an analyst for the CIA and a Cold War warrior, as he put it, though he has since become a strong critic of US imperialism and its “blowback”, or adverse repercussions for the US itself.¹⁶ He insisted that recognising the role the state could play in promoting capitalism was a way of saving capitalism from communism. As such, there are parallels between Johnson’s approach and the arguments put forward by economist John Maynard Keynes, who also wanted to save capitalism, although from itself.¹⁷ The neo-liberal establishment has now partly rehabilitated Keynes in the wake of the global economic crisis.

The term “developmental state” has subsequently been applied more widely in relation to the experience of industrialisation in East Asia, generally from the late 1950s to the early 1980s and often with particular reference to the experience of industrial change in Taiwan and South Korea. In the latter country, the connection between the state and industrial development was, if anything, stronger than in Japan, as highlighted by the important works of Alice Amsden and Robert Wade.¹⁸

Johnson’s contribution was, then, taken over and used with a very different motivation. It emerged as a central concept in a critique of the neo-classical approach to

development and its association with the neo-liberal Washington Consensus heavily promoted by the World Bank and IMF from the beginning of the 1980s. The latter emphasised that growth in East Asia had been brought about by trade liberalisation, private enterprise and restrictions on the role of the state.¹⁹ By contrast, the developmental state paradigm used by Amsden and Wade and a growing band of followers showed, by means of close empirical and institutional study, that high rates of growth were the product of high levels of investment in strategic industries and would not have taken place without government intervention. The state “governed” development²⁰ and created a pattern of production and investment that would not have resulted from “free” markets. Strategic state industrial policy created incentives, controls and mechanisms to spread risk, and this was supported by political, institutional and organisational arrangements.

These authors placed much emphasis on the need to correct market “imperfections” or, in Amsden’s famous phrase, to actively create such imperfections by “getting prices wrong” in pursuit of domestic industrialisation.²¹

During the 1980s and into the 1990s, the developmental state paradigm attracted a band of dedicated scholars inspired by the successes of the East Asian NICs and the dismal failure of the Washington Consensus. They offered much debate about the nature of the developmental state: how to define it, the conditions that are necessary for its emergence or which can undermine it, and the prospects of reproducing it in other contexts and periods.²² In particular, the authoritarian and militaristic nature of many developmental states, particularly South Korea and Taiwan, raised questions about the desirability of replicating it elsewhere, leading to the pursuit of the notion of the “democratic developmental state”.

As it has evolved, the literature of the developmental state has given rise to two distinct forms of analysis that reflect their disciplinary origins: the political and economic schools.

The political school is wholly concerned with whether the state has the so-called autonomy to pursue – and the institutions and motivation to adopt – developmental policies. In other words, it is concerned with the political, social, cultural and ideological conditions conducive to a state being developmental in its policies. The criteria used in labelling developmental states have been expanded and refined as more and more case studies have been brought into the fold – but without definitive results.

What is striking about the political school is the utter neglect of the economy itself and the economic or other policies required for economies, or a particular economy, to develop successfully and, in particular, to industrialise. This complements the point of departure of the economic school, which rejects neo-liberal arguments for the efficacy of the market in delivering development and, assuming the pervasive presence of market imperfections, suggests that industrialisation can only happen if the state adopts policies that correct or make use of such imperfections. For this school, it is a matter of the developmental state adopting the right policies, and these

merely have to be identified. In a mirror image of the political school, it neglects the question of why a state would do this or whether it has the required capacity. For the economic school, the developmental state is assumed to be benevolent if it has policies of the right kind.

So while the political school has pursued questions of whether the state has the capacity to be developmental and how one might understand the conditions for this,²³ the economic school is more concerned with identifying the economic policies required to achieve high rates of economic growth. In particular, it argues that the state must tackle market imperfections to achieve this.²⁴

The developmental state paradigm has had some notable successes, not least in forcing proponents of the Washington Consensus onto the back foot. The World Bank's report, *The East Asian Miracle*,²⁵ acknowledged the role played by the state, while suggesting rather weakly that the market would have achieved the same thing if it had worked perfectly. Ha-Joon Chang's work,²⁶ in particular, has exposed the hypocrisy of the proponents of the Washington Consensus who insist, through aid conditionality and advice, that developing countries pursue a mythical path of development that the states in the heartlands of capital did not themselves follow. The developing state paradigm can even claim to have been instrumental, at least in part and in the arena of scholarship, in forcing the World Bank to shift to the Post-Washington Consensus, pioneered by Joseph Stiglitz in the late 1990s. At least in principle, this is less pro-market and more state-friendly than the Washington Consensus, as it emphasises the significance of market and institutional failings and their correction through state intervention as the key to developmental success. Nonetheless, the Post-Washington Consensus also illegitimately outflanked the developmental state paradigm, never mentioning it and relying instead on the imperfections argument to rationalise piecemeal discretionary state intervention rather than systemic state strategies to achieve development.²⁷ In part, this reflected a weakening of support for the developmental state paradigm in the late 1990s, following the East Asian financial crisis and even denials, in its wake, that there had ever been an East Asian miracle at all.²⁸

The prominence of the developmental state paradigm has, therefore, exhibited a pattern, reflecting its potential as a critique of neo-liberalism in the area of industrial policy or as an explanation for successful industrialisation where it has occurred. There have also been attempts to explain developmental failures by pointing to its absence, for example in Africa, where the developmental state paradigm has been little used. The loose application of the developmental state concept to China and India makes it easier for the term to be used with a similar lack of precision in South Africa, without regard for its history and content.

Before examining how relevant the developmental state paradigm is to South Africa, it is worth exposing some of its analytical limitations. It takes the relationship between the state and capital as central but does this in a static way, neglecting the changing relations between class and state over time. South Korea is a good example of this, as the state has promoted the development of large-scale domestic conglomerate

capital (the *chaebol*) only to confront a powerful capitalist class capable of challenging, shifting or blocking state policy. In retrospective recognition of the problem, this has prompted the argument that the developmental state is itself of limited duration, and that it sows the seeds of its own demise by losing its autonomy to the capitalist class that it created. This presents a mirror image of the practice of blaming radical populism for supposedly causing the demise of earlier Latin American developmental states by creating an uncontrollable and dysfunctional working class that pursues unreasonable demands for wages and social services. It is symptomatic of a more general problem with the developmental state paradigm: despite claiming to offer a general analytical framework for understanding the role of state and the market, it tends to confine itself to the latecomer, catch-up industrialisation characteristic of East Asian NICs. It also tends to place considerable emphasis on industrial policy. What of earlier or later stages of development, and of other areas of significance for development and the application of policy?

Areas such as agriculture, health and welfare have tended to be neglected, with some relatively recent exceptions, as the developmental state paradigm was applied beyond the field of industrial policy. Previously, it was assumed – not altogether accurately – that the East Asian NICs depended on these being marginal in extent and importance, in contrast with education, which was needed to create a skilled workforce. Furthermore, labour is often dealt with in a weak manner or not at all, a glaring shortcoming given that the impressive rates of growth characteristic of the developmental state depended on high levels of exploitation and the repression of trade unions and progressive movements that offered resistance. The oversights relating to social policy, labour and democracy were, no doubt, partly motivated by a desire to sidestep unsavoury aspects of developmental achievement. This may explain why the developmental state paradigm has been unduly confined to industrial policy at a particular stage of development – latecomer catch-up – at the expense of the state role in agriculture, welfare and earlier and later phases (from catch-up to vanguard) of industrialisation.

It is also apparent that, while the paradigm has offered fairly general propositions about the role of the state in industrial development, it has been selective in its case studies. Any success tends to be seen as a developmental state, with China the latest preferred illustration of the developmental state in action, particularly at the local level.

Proponents of the developmental state paradigm have also couched much of their analysis in terms of institutional capacity. This is important for South Africa, where commentators have been much preoccupied with assessing “developmentalism” in terms of the capacity to formulate appropriate policies, mobilise and allocate resources in line with identified policy targets, and monitor and evaluate policies and their implementation. Recent work has used the idea of state capacity proposed by Cummings and Norgard,²⁹ who argue that it can best be understood in four dimensions: ideational, political, technical and implementational. On this basis, it is concluded that the South African state, while not powerless, has weak capacity.³⁰

However, there are good reasons for believing that low levels of institutional capacity in the state and private sectors have been exaggerated, given what has been delivered. Fine³¹ gives a number of examples of where the state and the private sector have shown significant capacity, notably the Treasury and in regard to Black Economic Empowerment – BEE (or should that be BEEE, Black Elite Economic Enrichment?). The problem is not so much lack of capacity, but the way it is generated, distributed and used as a reflection of political priorities. For the developmental state paradigm as a whole, this raises questions about the relationship between the use and creation of institutional forms and the underlying economic, political and ideological factors that determine their presence and role.

This underlines the biggest analytical weakness of the developmental state paradigm: its systematic separation of economics and politics and its acceptance of the “state *versus* market” dichotomy. We would argue that the state and the market are integral parts of the capitalist whole. To understand the specific form that state-market relations take in different times and places, it is critical to identify the underlying economic, political and ideological interests and social relations which shape state and market and their interaction. It is also necessary to specify the form class relations take as they evolve in particular settings. As mentioned earlier, the system of accumulation peculiar to South Africa is the minerals-energy complex. The South African case illustrates that in identifying alternative policy options, one must focus on the specifics of the society, but also on the shifting expression and balance of class forces as the economy evolves.

Because it fails to do this, because of its twofold dualism – state versus market and political and economic schools – the developmental state approach is profoundly flawed. Where it has provided insights is in highlighting the role of the state in capitalist development and the importance of state industrial policy for late industrialisation, in particular. In light of this, it is ironic that the developmental state debate should be so prominent in South Africa, a country where strategic industrial policy is marked by its relative absence and incoherence, especially in the post-apartheid period.

The changing dynamic of the minerals-energy complex: financialisation, internationalisation and South African capitalism

If the application of the developmental state paradigm to the South African economy, state and society has analytical limitations, why is reference to the minerals-energy complex more appealing? One reason, which has provoked controversy, is that this complex has historically dominated, and continues to dominate, South African capitalism. To suggest that mining has dominated the development of capitalism in South Africa since its emergence in the 1870s is not controversial; to argue for

the continued importance of mining and the cluster of industries that surrounds it is more so. However, we will show that the South African economy remains highly skewed towards minerals and energy as core sectors, and that the dynamic of the minerals-energy complex is the key to understanding South African capitalism both historically and now.³²

The concept of the minerals-energy complex was developed as a way of understanding the form of capitalism or capital accumulation specific to South Africa, the state's role in it and how this has made an impact on every level of the economy and society. The complex can be defined as a "core set of industrial sectors which exhibit very strong linkages with each other and relatively weaker linkages with other sectors", but our intention is not to focus on mining, minerals and energy sectors to the detriment of finance, the state or the political realm. It is to argue that the financial system and the state are "bound together"³³ by the minerals-energy complex. As we understand it, the complex is a close partnership between the state and private capital, with state-owned capital playing a major role.³⁴ It has evolved historically both in terms of the class nature of the relationship and how it is expressed in economic activity.

Between the two world wars and immediately afterwards, the South African economy was dominated by the mineral and energy sectors, which were in turn dominated by large English-speaking conglomerates, with Anglo American the leading force.³⁵ Afrikaner capital was smaller and economically and politically distinct. Both benefited from and supported a migrant labour system in which workers from across southern Africa were employed as miners, housed in compounds, segregated from whites and separated from their families.³⁶ However, the surplus generated by mining capital provided the space in which large-scale Afrikaner capital could develop, until it was eventually incorporated in English-speaking mining capital. Large corporations established by the state in the key areas of electricity, steel and transport provided a bridge between the economic power of mining capital and the political power of Afrikaners in the state.³⁷ Mining capital required these inputs but was reluctant to invest in them for fear that such investments could be threatened, even appropriated, by hostile Afrikaner interests, while Afrikaner capital benefited from these growth areas even if they ensured the continuing power of mining. This disjuncture of interests meant that there was no attempt to diversify away from the core mining sectors. The intermediate, capital and consumer goods sectors lacked economies of scale and scope and remained weak.³⁸

As a method of analysis, the minerals-energy complex identifies economic and political interests and how they gave rise to a system of accumulation realised through both the state and the market.³⁹ In particular, because of the decisive role of the complex in the rest of the economy, manufacturing has been confined to a limited number of primary industries, with weak development of capital and intermediate goods sectors. Both apartheid and post-apartheid economies have been marked by a failure to diversify from the core minerals-energy complex.

By the 1970s, mining and Afrikaner capital were sufficiently integrated to make industrial diversification more feasible. But global conditions at the time – the end of the post-war boom, the collapse of the Bretton-Woods system and the sharp rise in gold and oil prices – brought intensified reliance on the core mining-energy complex. The 1970s saw a huge state-led programme of expanded production in the gold, energy and related sectors. A range of industrial policies was introduced to expand the role of state capital and co-ordinate its operations with private capital. With this emphasis on strong state intervention as a way of developing specific sectors, the apartheid state was closer to a developmental state than at any time in the post-apartheid period. But the policy was applied only to the minerals-energy core.

The 1980s were years of economic and political crisis for the apartheid state. Core sectors of the minerals-energy complex remained central to the economy, and there was little discussion of industrial diversification. Government capital controls and sanctions meant that much of surplus generated from mining and energy remained in the country – with the exception of illegal capital flight. This led to intensified conglomeration across the economy and the development of a large and sophisticated financial system. It has modified the pattern of accumulation – over the past two decades, the ruling dynamic of the minerals-energy complex has been the financialisation and internationalisation of its operations.

Developments since the end of apartheid make this clear. The strategy of the dominant corporations in the minerals-energy complex – and their links with and influence on state policy – have continued to be critical in determining the pattern of economic development. On taking office, the ANC's goals in resurrecting the South African economy were initially set out in the Reconstruction and Development Programme (RDP), which focused on increasing the rate of economic growth, increasing the rate of investment to stimulate growth and modernise production, and achieving higher investment and growth to increase employment and bring about a more equal distribution of income and wealth. While the RDP offered “an integrated, coherent socio-economic policy framework”,⁴⁰ it was silent on the specific policies and government interventions deemed necessary to meet these goals.

Two years later, in 1996, the “non-negotiable” Gear strategy replaced the RDP, setting the government's macroeconomic policy framework for economic and industrial development for the next five years. Gear provided an unambiguously neo-liberal macroeconomic framework, emphasising fiscal austerity and deficit reduction while pegging taxation and expenditure as fixed proportions of GDP. The government's stated macroeconomic priorities became the management of inflation, the deregulation of financial markets, tariff reduction and trade liberalisation, and restrictions on government expenditure. Despite a policy of high interest rates, the government maintained the belief that the private sector would drive industrial development, with inward foreign direct investment targeted as a major source of resources. However, domestic conglomerates continued to be conspicuously absent from growth and development.

The policies associated with Gear were more or less indistinguishable from orthodox International Monetary Fund (IMF) stabilisation policies. The result has been:

- Capital flight as corporations have internationalised and financialised their operations aided by the state's relaxation of capital controls, contributing to historically poor levels of domestic investment;
- Increasing financialisation of the economy, which has produced growing private debt and an increase in luxury consumption. This has deepened entrenched inequalities, as the majority of South Africans are excluded from financial services, and further exacerbated the lack of domestic investment;
- Decline of much manufacturing industry outside the minerals-energy complex as a result of trade liberalisation, further increasing record unemployment and fueling casualisation and outsourcing; and
- Further concentration of industry on core, profitable mining and energy sectors, reinforcing dependency on exports and lack of diversification, as well as facilitating elite enrichment through BEE as conglomerates have restructured.

The past 15 years have thus seen the continued dominance of the minerals-energy complex in a changed form, while in response to the current economic crisis, it is now possible that the state-led accumulation of the 1970s will be renewed. However, major South African corporations, such as Anglo American, De Beers, Old Mutual, South African Breweries, Liberty, Sasol and Billiton, have primarily pursued a strategy of corporate globalisation by increasingly internationalising and financialising their operations. This has entailed the exporting of domestic resources and control and relisting on the London stock exchange, with the aim of moving large amounts of capital in the form of dividends and other payments legally out of South Africa, unhampered by the exchange control restrictions which apply to residents (Figure 1 shows net capital flows as a percentage of GDP). The corporations are catching up after the debt freeze of 1985, and in the process, denuding the domestic economy of capital. It is ironic that the asset values associated with financialisation have been hard hit by the current global crisis.

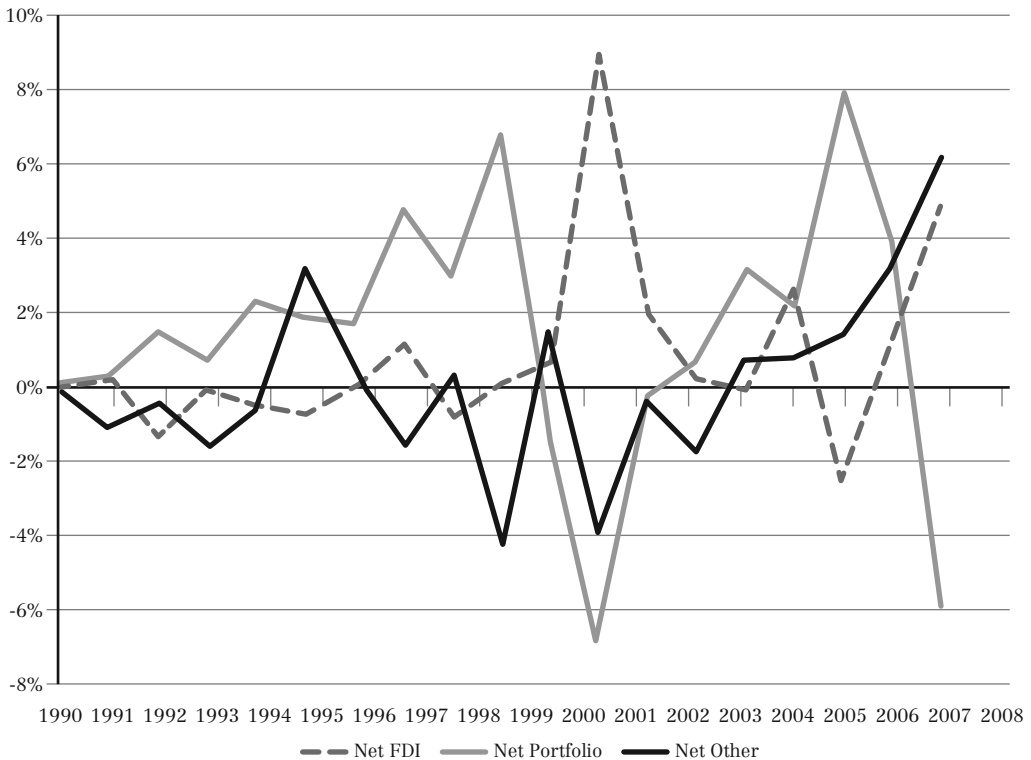
The capital flight was in part a consequence of capital's fear of losing political – and hence economic – control after the end of apartheid.⁴¹ But it also took place because the end of apartheid coincided with important changes in the global economy. South African corporations took the opportunity to internationalise their operations and participate in the mergers and acquisition frenzy of the 1990s, which also led to heightened concentration in many domestic sectors despite conglomerate unbundling.⁴² Corporations have concentrated their operations on core sectors and sold off diversified interests in South Africa, but in a way that has heightened corporate concentration within sectors, even if overall conglomeration across sectors has declined.⁴³ Raising “stakeholder value” has driven the process, at the expense of other goals such as employment creation and industrial development.

Furthermore, macroeconomic policy has largely underpinned these developments. The vaunted goal of macroeconomic stability, pursued by Trevor Manuel as Minister of Finance until earlier in 2009, has entailed extensive trade and financial

liberalisation, including the progressive removal of financial and exchange controls after 1995.⁴⁴ The main consequence has been the smooth exportation of capital on favourable terms, rather than a sudden flight of capital and a collapse in the value of the rand, which would diminish the value of assets to be moved abroad. The flight of dividends, profits and interest payments has increased pressure on South Africa's current account, and has been balanced by high domestic interest rates designed to attract short-term and potentially volatile capital inflows.

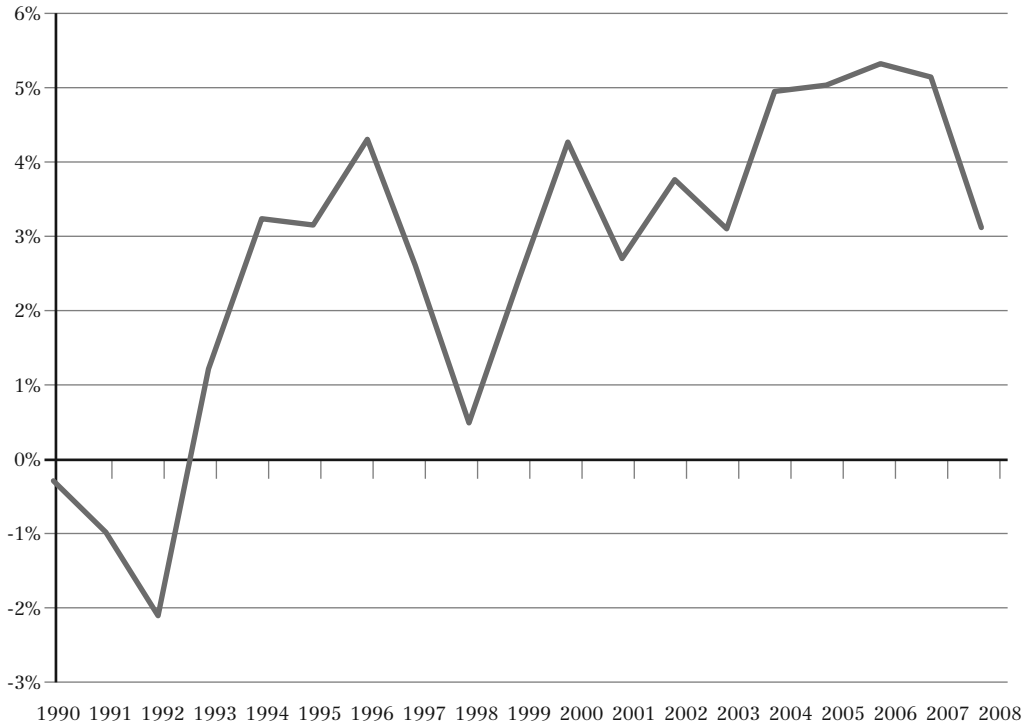
Significantly, Mohamed and Finnoff estimate that capital flight from 1994 to 2000 stood at 9.2% of GDP per year, compared with 5.4% between 1980 and 1993.⁴⁵ Accumulated capital flight from 1980 to 2000 was 37% of the value of cumulative gross fixed capital formation for the same period,⁴⁶ with obvious implications for resources available to the domestic economy.

Figure 1: *Net capital flows as a percentage of GDP 1990-2008*



(Source: SARB 2008)

While the government could claim to have brought inflation down to single digits, policies under Gear saw the virtual collapse of growth between 1996 and 1998 (Figure 2), together with stagnant or modest increases in gross domestic fixed investment and capital formation. While many factors influenced the performance of the economy in 1996-1998, Weeks⁴⁷ argues that there is a *prima facie* case that the Gear policy package made a significant contribution to the collapse of growth because of its emphasis on deficit reduction.

Figure 2: *Annual GDP growth rate in South Africa 1990-2008*

(Source: SARB 2009)

Gross domestic fixed investment and capital formation have been stagnant or have undergone only slight increases. Investment as a proportion of GDP declined from an average of 26.9% in the 1970s to 19.1% in 1990 and 14.7 % in 2001.⁴⁸ It is true that manufacturing investment picked up in the mid-1990s, but not only was this not sustained, it was solely due to two industries in the minerals-energy complex – iron and steel and non-ferrous metals.⁴⁹ In 1999 and 2000 total investment fell.⁵⁰ More recently, until the global economic crisis, platinum mining was a key growth area (Figure 3). The only sector outside the minerals-energy complex which has seen a growth in investment is automobiles, parts and components, promoted in a rare example of state industrial policy.⁵¹

Figure 3: *Change in the capital stock across sectors 2000 – 2008*

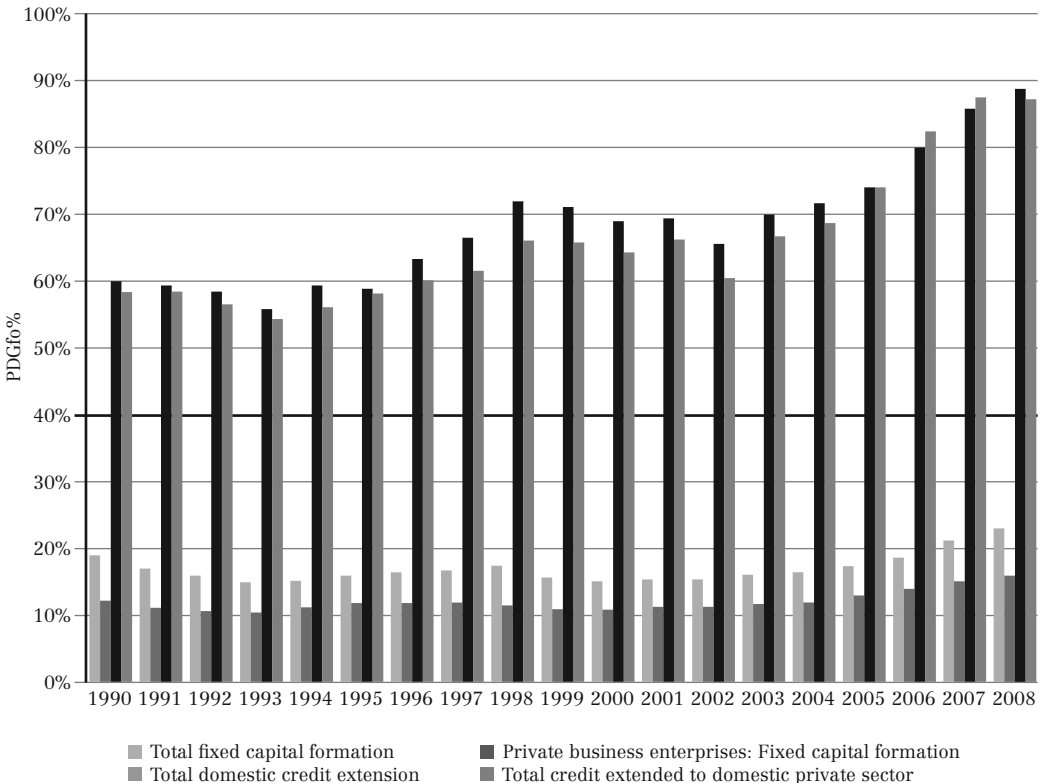


(Source: SASSID 2009)

In each of these respects, the post-apartheid South African state has been the anti-thesis of a developmental state harnessing funds for investment. It has chosen to adopt neo-liberal economic orthodoxy in deference to private capital's global goals, rather than coaxing or coercing private capital to invest in order to achieve economic growth and structural transformation. So, rather than capital being caught in an "organic crisis", as argued by Saul and Gelb,⁵² it could be said to have "disengaged itself quite successfully from the social crisis" in South Africa and "engaged fairly well with international business trends".⁵³

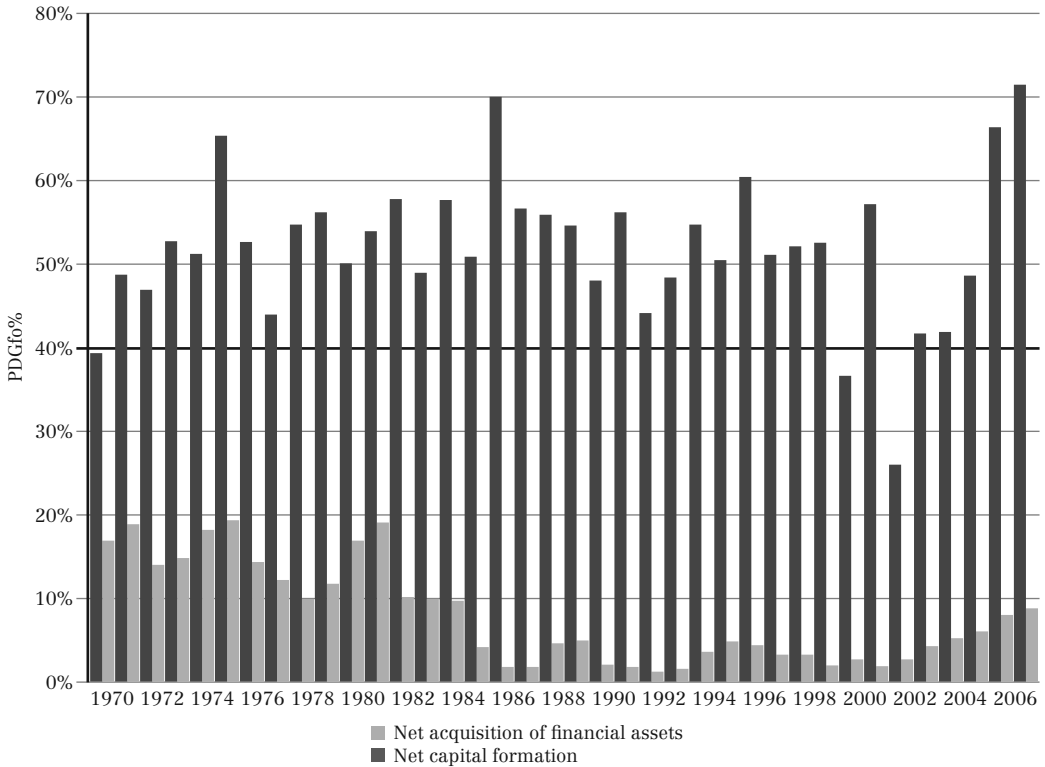
The obverse of liberalisation and capital flight has been an increase in short-term capital inflows into South Africa through the private financial sector, attracted by the highest real interest rates in the country's history⁵⁴ and adopted as the government tightened monetary policy to reduce inflation (which made the financing of investment more expensive). The vast bulk of these inflows have gone into financial speculation and the extension of private credit to households (Figures 4 and 5).

Figure 4: *Credit extension and investment as percentages of GDP 1990-2008*



(Source: SARB 2008)

Figure 5: Comparing net capital formation and the net acquisition of financial assets as a proportion of GDP 1970-2007



(Source: SARB 2008)

Growing private debt has been incurred mainly on luxury consumption items such as expensive cars and second houses. This has deepened inequality, as living standards have risen for a minority while 40% of the population remains excluded from the financial system.⁵⁵ South Africa's banks are now among the most profitable in the world.⁵⁶ And as the growth of household debt has underpinned the buying of second houses, there has been a huge property bubble, with a 389% increase in property prices between 1997 and 2008.⁵⁷

Financial services have increased their overall weight in the economy, while manufacturing has declined as trade liberalisation has devastated industrial sectors such as textiles, which lies outside the core minerals-energy complex. The expansion of services has not been in high-tech areas, however, while the few jobs created are in low-wage industries such as security and cleaning services and are accompanied by large amounts of outsourcing and informalisation.⁵⁸

The government's stance has not been entirely static. In the introduction to *State of the Nation: South Africa 2004-2005*, the editors noted that "the African National Congress is in the throes of shifting from ... Gear to a more interventionist, developmental state",⁵⁹ and by the following edition, as the second Mbeki presidency

unfolded, it was noted that a serious debate had begun about the changing nature and role of the state.⁶⁰

The Accelerated and Shared Growth Initiative for South Africa (Asgisa) was formally launched in February 2006 with the aim of broadening the base of BEE and promoting the emergence of a black business class, redressing the inequalities between the so-called first and second economies by providing broader access to public goods and services, improving the “business environment” by reducing the cost of such services as transport and communications, and reducing unemployment by promoting labour-intensive exports in services.⁶¹ But as Gear mutated into Asgisa, South Africa’s macroeconomic policy remained largely unchanged and continued to reflect the needs of conglomerate capital.

In contrast with Gear, Asgisa does encompass a number of interventions at the micro-level. These are organised into four categories: infrastructure investment programmes, sector investment or industrial strategies, skills and education initiatives, and second economy interventions.⁶² State-owned enterprises, in particular, are seen as “drivers of growth and development”. Through their capital expenditure programmes, transport and logistical holding company Transnet and the public electricity company, Eskom, were planning a combined expenditure of about R243-billion over the period 2006-2011, with R160.8-billion spent on capital improvements (infrastructure and equipment) and R82-billion on operational activities. The government is investing large amounts in the hosting of the 2010 World Cup for the building and upgrading of ten stadiums and the energy, transport and telecommunications infrastructure needed for the event. But there is a conflict between liberal macro-policies and these micro-interventions, with the former supporting short-term capital flows that bolster the private financial sector and allow it systematically to misallocate finance towards speculative and short-term projects and away from longer-term investments. Bond describes the “developmental state policies” of Asgisa and BEE as “a combination of macroeconomic neo-liberalism and unsustainable megaproject development, dressed up with rather tokenistic social welfare policy and rhetorical support for a more coherent industrial policy”.⁶³

What, then, should we conclude about the interconnection of capital flight, financialisation, de-industrialisation and corporate concentration in economic sectors? And how could an alternative approach to state intervention and industrial policy be formulated to pursue more equitable outcomes? It seems clear that South Africa’s pattern of economic and industrial development remains heavily skewed towards the industries around which racial segregation and apartheid grew. The minerals-energy complex has changed over time, but South Africa remains highly dependent on world commodity prices and vulnerable to currency crises when commodity prices collapse, as they have over the recent period. The country lacks secondary industrialisation and employment, while financialisation and capital export have contributed to widening inequality, jobless growth and lack of investment. At most, wider economic and social goals act as a constraint on “business as (un)usual”, but despite BEE and the social grants programme, there is little substantive progress towards developmental goals and redressing the apartheid legacy.

This chapter does not intend to offer detailed policy proposals, not least because different sectors of the economy have different needs. However, government intervention since 1995 in facilitating neo-liberal financialisation suggests the existence of considerable state capacity which could be turned towards meeting the basic needs of the vast majority of South Africans, creating greater equity and helping to eradicate poverty.

State intervention and industrial policy should be driven by the goals of meeting basic needs, creating decent employment and providing education and training and social and economic infrastructure – particularly healthcare, water and electricity. Priority could be given to channelling investment from private and public sources into these areas of social priority, with capital controls being used to reduce speculation, capital flight and disinvestment. Reform of the financial system could ensure funds are available for investment across all economic sectors, rather than serving conglomerate interests through the export of capital in pursuit of short-term gains in profitability. Greater state intervention and ownership should be coupled with the transformation of the composition, goals and rationale of state expenditure so that it reflects the desire to meet the needs of the majority through their democratic participation. Social grants should be expanded in response to the current economic crisis and entrenched impoverishment, but such income support should be increasingly complemented by the growing public provision of basic needs such as housing, transport, health and education. The lowering of food and fuel costs can be achieved through harsher competition policy against cartels, coupled with agrarian reform. All of these measures require a radical shift from market ideology and the narrow conception of industrial policy which has come to predominate in the neo-liberal era – a shift that requires a determination to overcome powerful corporate interests.

Conclusions

The developmental state paradigm largely came to prominence as a critique of the Washington Consensus, providing incontrovertible empirical evidence of the role of state intervention in promoting successful development in East Asian NICs. Our argument is that post-apartheid South Africa has singularly failed to exhibit the conditions and characteristics conducive to success according to this paradigm. Indeed, the opposite has been true, as neo-liberal policies have been adopted and pursued. The state, rather than disciplining capital towards domestic accumulation, has aided capital flight on an enormous scale, contributing to historically low levels of investment, especially outside traditional core sectors of the minerals-energy complex and finance.

This chapter has also underscored analytical flaws in the developmental state paradigm. This is important if one is to make sense of the debate in South Africa and how it might be turned to developmental advantage. For this is not simply a matter of the right politics, institutions and policies, but of how economic, political and ideological interests can be mobilised for developmental goals. Such interests do exist, but

need to be set against the continuing dominance of South Africa's political economy by the minerals-energy complex and its influence over developments through the state and market.

The state and private capital in South Africa have perpetuated a particular structure of production dominated by a cluster of industries around mining and energy. Capital flight and financialisation have occurred in the context of this structure of production and have reinforced it. As those who developed the concept of the minerals-energy complex have described, the entrenched inheritance of apartheid – inequalities of income and wealth, as well as in the provision of infrastructure health, education, welfare and employment – remain “the continuing basis on which society functions” 15 years after apartheid came to an end.⁶⁴

What is one to make of the developmental state debate in South Africa? Given the pattern of development described above, it is not surprising that neo-liberal policies have produced widespread anger and disillusionment among the mass of South Africans and acute political tensions between the ANC and its allies, Cosatu and the South African Communist Party. The struggle against Thabo Mbeki in the ANC must be seen as connected with sustained protests against service delivery failures, often led by ANC supporters, if not members, and workers. The June 2007 public sector strike was the largest work stoppage since 1994 and, in terms of working days lost – at least 11 million – the largest in South African history.⁶⁵

Political tensions in the tripartite alliance were so intense that, as Gumede⁶⁶ points out, an internal SACP poll at the end of 2004 found that the majority of members favoured breaking links with the ANC. At a special SACP national general council meeting in April 2005, the majority of delegates were in favour of the party standing independently in the 2006 local government elections, that is, of forming some kind of independent workers' party. This was not adopted as policy, as SACP and Cosatu leaders fought hard to keep the dissatisfied within the framework of alliance politics.⁶⁷ But such grassroots disaffection is vital in understanding the shift from Mbeki to Zuma at the ANC's national conference in Polokwane in December 2007 and the change in government in September 2008. Cosatu has been referred to as the “elephant in the room” at Polokwane.⁶⁸

The emergence of the developmental state discussion needs to be set in this context. South Africa is so far from being a developmental state that it is farcical for it to claim such status – except to serve the interests of private corporations and the new elite. It is astonishing that the intellectual community and the political opposition should take the casual declarations of politicians so seriously; that they have done so apparently reflects the intensity of their desire for policy alternatives. The use of the concept by politicians was initially opportunistic, filling a gap between rhetoric and practice, but it has now come to mean different things to different people. Zuma became a symbol of and focus for dissatisfaction and dissent, rather than offering leadership in a new direction, and there has at most been a reopening of debate about economic policy that was subdued, if not shut down, with the introduction of Gear.

Indicative of the confusion is the new government's creation of a Ministry for Economic Development headed by former trade union leader Ebrahim Patel. At the same time, it has established a National Planning Commission which, though designed and promoted by prominent SACP member Jeremy Cronin during the election campaign as part and parcel of achieving South Africa's developmental state,⁶⁹ is now headed by Manuel, who has been far from sidelined. An anonymous member of Zuma's executive told the *Mail & Guardian*⁷⁰ that Manuel is effectively playing the role of prime minister. The former finance minister used the platform of the World Economic Forum in Cape Town in June to attack business leaders as "cowards" for not standing up more to labour's demands⁷¹, as unions in June protested over the refusal of the Governor of the Reserve Bank, Tito Mboweni, to lower interest rates and abandon the central neo-liberal policy plank of inflation targeting. Zuma then replaced Mboweni with Gill Marcus, who has yet to distance herself from the neo-liberal policies of her predecessor.

The current conjuncture is complex and uncertain. On the positive side is the strength of democratic processes in the broadest sense, shown by the removal of Mbeki as an expression of popular discontent, without a coup or bloodshed. And there is an active trade union movement which seeks to exert its influence on matters other than its members' immediate interest in wages and conditions, and which could forge links with important new social movements resisting neo-liberal policies and poverty. A wave of service delivery protests and strikes erupted again in July and August 2009. On the other hand, the new government is making political and institutional compromises, if not dysfunctional fudges – as in the duplication of ministers who are apparently expected to establish their own pecking order – rather than coordinating and directing ministerial responsibilities.

The final shape of the new order is not a matter internal to government – the outcome will depend on the strength, solidarity and effectiveness of militancy on the ground. Moreover, the government has not yet properly identified and engaged with the key issues that we have highlighted as necessary for South Africa to become developmental. These boil down to the role to be played by corporate capital in its own right and in relation to the state. This is the key lesson to be garnered from the developmental state paradigm. The task that lies ahead is that of maintaining the new democratic culture and turning it to the promotion of policies and institutions that serve the majority, against what will almost certainly be acute hostility from domestic and, what is increasingly the same thing, international capital.

In the past, understandable but questionable loyalty to the ANC government has been rationalised by suggesting that there is little alternative to compromising with, or submitting to, the dictates of macroeconomic stability and austerity (read conglomerate capital flight). Such postures have been discredited by the under-performance of the post-apartheid state and the loss of neo-liberal legitimacy in the wake of the global crisis. But the close of the neo-liberal era requires a far more radical shift in policy than is currently on offer, if South Africa is to meet the basic needs of the majority. The post-apartheid government's failure to deliver more progressive policies is more

than a reflection of economic mismanagement – it also conceals a desire not to provide a platform for more progressive and potentially oppositional movements. Every act of state provision potentially creates a constituency for continuing, enhanced and widened provision.

The politics of the current period are heavily marked by a transition from apartheid in which the ideological and organisational unity required for its destruction has rapidly dissipated.⁷² Struggle against the consequences of neo-liberalism has been extensive but fragmented. Progressive outcomes will depend on the strength and unity of popular movements. The struggle for jobs, justice, basic needs and an alternative society begins with fragmented struggles in practice and the task of forging them into a common purpose, a dialectical task of definition, leadership, organisation and popular participation.

ENDNOTES

- 1 The authors write in their capacity as members of the Minerals-Energy Complex Working Group of the International Initiative for Promoting Political Economy <http://www.soas.ac.uk/iippe/>
- 2 <http://www.anc.org.za/elections/2009/manifeto/manifeto.html>
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- 15 See Chang: *Bad Samaritans*, although he rarely uses the term 'developmental state'.
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POVERTY, INEQUALITY AND THE NATURE OF ECONOMIC GROWTH IN SOUTH AFRICA

HAROON BHORAT AND CARLENE VAN DER WESTHUIZEN¹

Introduction

During the first decade of democracy in South Africa, the economy recorded one of its longest periods of positive growth in the country's history. One of the more vexing issues on the economic policy terrain in post-apartheid South Africa, however, has been the impact of this consistently positive growth performance on social welfare, specifically income poverty and inequality.

Many observers have highlighted the potentially harmful consequences of persistently high levels of poverty and, particularly, economic inequality on the quality and sustainability of democracy.² High levels of inequality have been linked to lower voter turnout, depressed political engagement and high crime rates – all of which can have a negative impact on the quality of democracy. Increasing levels of income inequality also have the potential to divide citizens and contribute to social conflict. In such a situation, the diverse pressures on government can lead politicians to resort to underhand tactics such as “playing some voters off against each other”.³

Empirical evidence from across the world confirms that persistent high levels of inequality have resulted in serious challenges to democracy, with outcomes ranging from citizens' declining willingness to support democracy to the full-blown reversal of democratic rule.

Well and Kriekhaus⁴ analyse how a range of individual personal characteristics and attitudes, as well national economic and political variables, have influenced democratic support in a sample of 35 countries, including those in Western and Eastern Europe, Latin America and Asia, and South Africa. One of their key findings is that economic inequality has a highly significant negative influence on citizens' willingness to support democracy.

In their investigation of democratisation between 1960 and 2004 in 88 countries, Kapstein and Converse⁵ found that inequality was significantly higher in democracies

that eventually underwent a reversal – in other words, where democracy failed. They also conclude that economic growth is not enough to ensure the sustainability or consolidation of democracy, and that the extent to which economic growth has benefited all citizens is the key to sustaining democracy. In other words, the distribution of income, assets and opportunities is important for the survival of democracy. Well and Kriekhaus do, however, recognise that other factors contribute to the survival of a democracy, including the quality of political institutions.

Fukuyama⁶ investigates the role that high levels of inequality have played in the political destabilisation of Latin American democracies over the past decade, discussing numerous examples where persistent levels of inequality have given rise to disruptive social movements and social conflict. In an article focusing on democracy in Africa, Lewis⁷ describes the phenomenon of “growth without prosperity” in the continent’s new democracies and warns that the divide between popular expectations and economic realities can harm the consolidation of democracy in these countries.

In South Africa there has been a rich debate about the impact of economic growth on poverty and inequality in the post-1994 era. However, it has been hamstrung by the lack of recent data. In particular, the debates about shifts in household poverty and inequality in South Africa have relied on the income and expenditure surveys of 1995 and 2000, together with a range of unofficial or less than satisfactory data sets. The consensus, a carefully constructed one based on these data sets, is that in the first five years of democracy (1995–2000), income poverty levels based on a range of realistic poverty lines had probably not changed much.⁸ World Bank evidence has suggested a rise in national household poverty from 32% to 34% using a \$2 a day poverty line, and no change in poverty on a slightly higher poverty line (R322 per month) between 1995 and 2000.⁹ Subsequent work, relying on a slightly different set of poverty lines, has suggested that income poverty may have *declined* between 1995 and 2000.¹⁰ Ultimately, based on the choices made according to these data, economists have arrived at slightly different conclusions regarding poverty shifts in the 1995–2000 period.

The key common denominator in all these results, however, is that the increase or decrease reported is relatively minor. Evidence for income inequality indicates marginal increases in the Gini coefficient in most of the studies.¹¹ These results, however, do suggest that the first five years of democracy were not accompanied by significant improvements in the welfare of South Africa’s citizens.

The first key purpose of this chapter, then, is to extend the debate to the first decade of democracy by analysing the Income and Expenditure Survey (IES) of 2005. With the IES 2005 we can, for first time, provide a comprehensive overview of changes in poverty and inequality in the first full decade of democracy in South Africa. Hence, the primary contribution of this chapter will be to provide a profile of poverty and inequality in South Africa in 1995–2005.

In trying to understand the critical interactions between economic growth, poverty and inequality, the paper will also try to determine whether the positive growth rates recorded since 1994 have improved indicators of social welfare in the South African economy, and whether this trajectory of economic growth has been pro-poor. By analysing the relationship between economic growth, poverty and inequality, we hope to shed light on how economic growth may have contributed, or failed to contribute, to the quality and sustainability of democracy in South Africa.

The second section of the chapter estimates the shifts in poverty for the first decade of democracy in South Africa, while section three provides an overview of the changes in inequality over the period. The fourth evaluates the impact of the positive economic growth on the expenditure of poor people over the decade, then we evaluate what has driven the increase in expenditure by the poor since 1995, with a specific focus on the role of the country's state social security system.

Shifts in poverty under democracy

Table 1 presents the changes in the headcount rate and the poverty gap ratio between 1995 and 2005, both nationally and by race. All poverty measures have been calculated using individual per capita household expenditure,¹² and the indicators are based on the standard class of poverty measures, first defined by Foster, Greer and Thorbecke.¹³ The headcount rate simply refers to the share of the total population with expenditure below a pre-defined poverty line. The poverty gap ratio is a measure of the average poor person's expenditure relative to the poverty line.

The results indicate that at the aggregate level for Africans, poverty as measured by the headcount rate declined in the first decade of democracy in South Africa. Specifically, using the higher poverty line of R322¹⁴ a month in 2000 prices, aggregate poverty declined by three and a half percentage points, from 52.5% in 1995 to 49% in 2005, while at the lower poverty line of R174 (also in 2000 prices) there was a more than seven percentage point decline, from 31% to 24%. The relatively larger decline at the lower poverty line suggests that those in deeper poverty experienced a relatively larger improvement in their welfare over the period.

Relative poverty measured by the poverty gap ratio shows a similar trend in aggregate terms. At the R322 line, the poverty gap index declined from 26% to 21%. This means that in 1995 the average poor person lived about 26% below the R322 poverty line, while ten years later, the average poor person lived 21% below it. At the lower poverty line, the poverty gap ratio declined from 12% to about eight percent. These results suggest that the reduction in the headcount index and poverty gap was both significant and robust in terms of the choice of poverty line.

Table 1: Poverty shifts by race of household head: 1995-2005

Category	Headcount index		Poverty gap ratio	
Year	1995	2005	1995	2005
	R322 a month poverty line			
African	63.04	57.55	31.86	25.23
Coloured	39.00	35.13	14.66	13.51
Asian	4.71	8.43	1.03	2.32
White	0.53	0.38	0.22	0.11
Total	52.54	49.03	26.04	21.29
	R174 a month poverty line			
African	38.18	28.17	14.71	9.01
Coloured	14.62	12.94	4.09	4.09
Asian	0.82	1.60	0.14	1.09
White	0.23	0.07	0.09	0.00
Total	30.92	23.55	11.77	7.54

Source: Statistics South Africa¹⁵ and own calculations

Poverty lines are in 2000 prices. At both poverty lines, the changes in the headcount rate are statistically significant at the 95% level at the aggregate and for Africans. The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

The results by race indicate that only African individuals experienced a decline in levels of poverty between 1995 and 2005. For Africans, however, the decline in the headcount index using both poverty lines was relatively larger than the decline at the national level. Using the R322 line, the headcount rate declined by more than five percentage points, from 63% to just below 58%, while using the R174 line, the headcount rate declined by more than ten percentage points to 28%. Over the same period, Africans also experienced a decline in their levels of relative poverty. Using the R322 line, the poverty gap ratio fell from 32% to 25%, while it dropped from 15% to nine percent at the lower poverty line. The other three population groups experienced no statistically significant change in their absolute and relative levels of poverty over the period.

While Africans did experience decreases in their headcount rates using both poverty lines, their poverty levels, as measured by the headcount indices, still remained higher than both the national estimates and those of other race groups. For example, in 2005 using the upper poverty line, the national headcount rate was 49%, while the African headcount rate was almost nine percentage points higher, at 58%. In contrast, the coloured headcount was 35%, while eight percent of Asians were poor using this line. Less than one percent of whites were poor using both lines and in both years.

Given the results, it is not surprising that Africans accounted for a disproportionate share of poor people in the country using both poverty lines (See Appendix 1 on pg 68 for the breakdown of population and poverty by race) and in both years. Africans accounted for about 77% of the population in 1995, increasing to 79% percent in 2005. In both years, however, about 93% of the population living on less than R322 a month (in 2000 prices) was African. Africans clearly continue to have a much larger share of poverty than their share of the total population, while the other race groups accounted for a considerably smaller share of poverty relative to their population size. By way of contrast, in both years whites accounted for less than one percent of the poor population according to both poverty lines, while making up about 10% of the population.

In addition to race, gender remains a key marker of vulnerability in South Africa. The table below estimates the change in poverty levels according to the gender of the household head. In line with the national trends and those for the African population, the data shows that both male-headed and female-headed households experienced a decline in poverty levels, as measured by the headcount index using both poverty lines. While people living in male-headed households experienced a relatively larger drop of more than six percent in their headcount rate using the upper poverty line, female-headed households experienced a slightly larger decline in their headcount rate using the lower line.

This suggests that at the lower poverty line, poverty reduction in the more vulnerable category of households – those that are female-headed – was greater than that of their male-headed counterparts. While the severity of poverty declined irrespective of the gender of the household head in the ten-year period, the evidence shows no bias in respect of female-headed households.

Table 2: Poverty shifts by gender of household head: 1995-2005

Category	Headcount index		Poverty gap ratio	
Year	1995	2005	1995	2005
	R322 a month poverty line			
Male	45.83	39.42	22.22	16.57
Female	65.65	61.56	33.52	27.42
Total	52.54	49.03	26.04	21.29
	R174 a month poverty line			
Male	26.12	17.77	9.79	5.67
Female	40.31	31.06	15.63	9.96
Total	30.92	23.55	11.77	7.54

Source: Statistics South Africa (1995 and 2008) and own calculations.

Poverty lines are in 2000 prices. All changes in the values of the headcount rates and the poverty gaps between 1995 and 2005 are statistically significant at the 95% level. The population in 1995 has been weighted by population weights according to the 1996 census, while population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

Despite the greater poverty reduction in female-headed households, it is important to note that people living in households headed by women remained more vulnerable, in both absolute and relative terms, than male-headed households. For example, at the upper line in 2005, the headcount index for female-headed households was still a massive 22 percentage points higher than for households headed by males, while at the lower poverty line, a decade into democracy, this differential was more than 13 percentage points higher. In 2005, the poverty gap ratio for male-headed households suggests that the average poor person in households headed by men was living about 17% below the poverty line, while the average poor person in a female-headed household was living more than 27% below the poverty line.

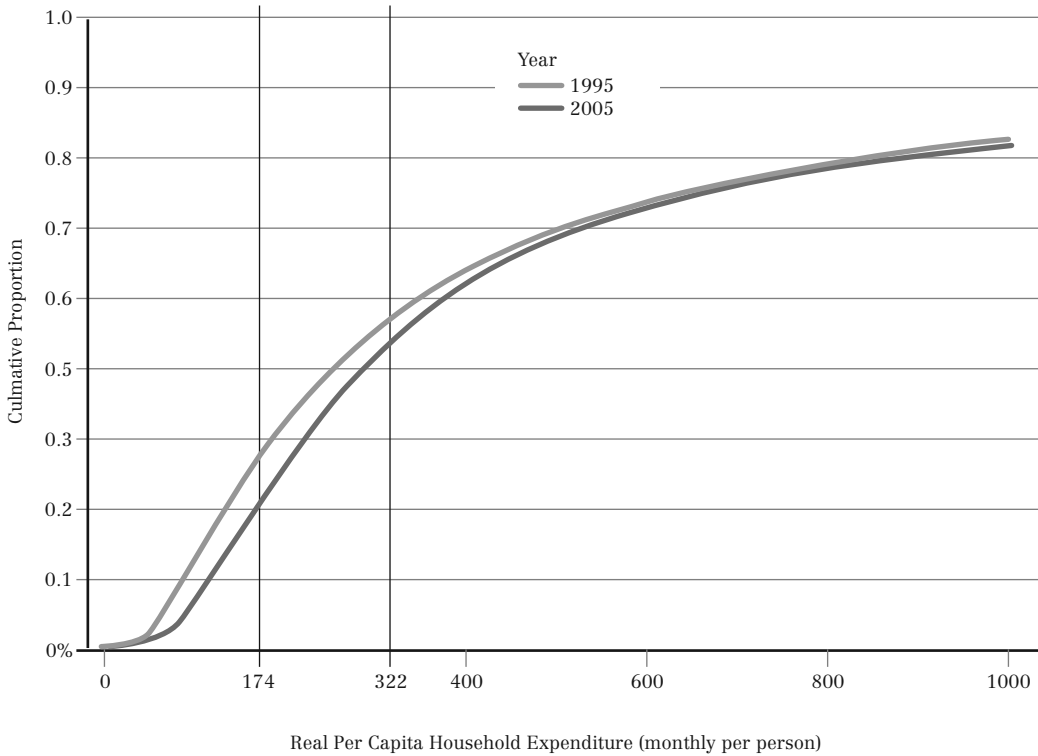
The population and poverty shares presented in Appendix 1 confirm that people living in female-headed households also continued to account for a larger share of poverty than their share in the population.

It is clear from the above that the first decade of democracy did see a reduction in poverty at the national level, and that both absolute and relative poverty declined significantly in 1995-2005. The result is also robust in terms of the choice of poverty line. However, the data also illustrates that in two key markers of vulnerability – race and gender – challenges remain. Despite reductions in African poverty, people living in households headed by Africans account for a disproportionate share of the poor in the society. And female-headed (predominantly African) households yield vastly higher headcount and poverty gap ratio estimates in both 1995 and 2005, reflecting the strong gender bias in the country's poverty profile.

Poverty shifts without poverty lines: 1995-2005

The estimates presented in the tables above show that at a national level, both the headcount and poverty gap indices declined in terms of the two poverty lines. Another way of assessing the changing pattern of poverty – and one that is not hamstrung by debates about the choice of the poverty line – is by deriving cumulative distribution functions (CDFs) of per capita expenditure. The vertical axis of the CDF shows the cumulative proportion of all South Africans with a monthly per capita expenditure value less than, or equal to, the corresponding monthly per capita expenditure value on the horizontal axis. CDFs allow us to compare changes in poverty between two dates independently of any poverty line. If a CDF for period $t+1$ lies at any point on the horizontal axis below the CDF for period t , it means that poverty has fallen between the two periods, irrespective of any poverty line. Figure 1 below presents one such CDF.

The CDFs in Figure 1 show that for South Africans spending less than about R1 000 a month (in 2000 prices) poverty either declined or, using a poverty line above R800, remained constant between 1995 and 2005. For those spending between R600 and R800, however, the gap between the two CDFs does seem very small, reflecting a minor or possibly no change in absolute poverty levels.

Figure 1: *Cumulative distribution functions, 1995 and 2005*

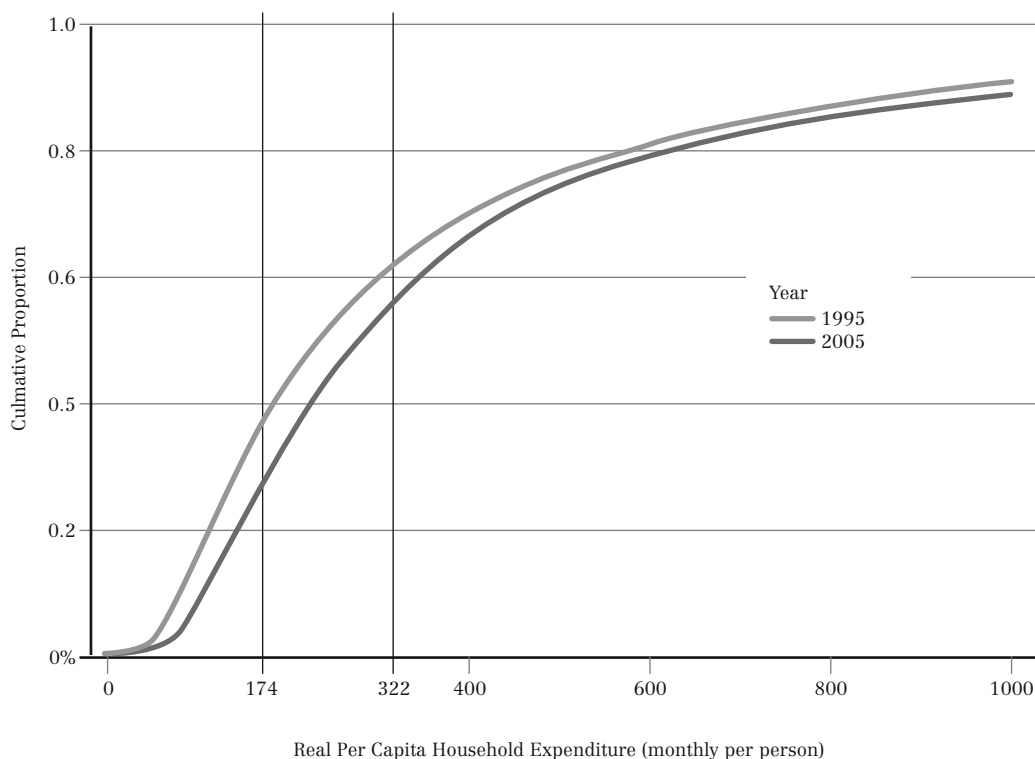
Source: Statistics South Africa (1995 and 2008) and own calculations.

Per capita expenditure as converted to real per capita expenditure (expressed in 2000 prices) using the Consumer Price Index. The population in 1995 has been weighted by population weights according to the 1996 census, while population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

Importantly also, this suggests that the decline in the headcount reported above (or the lack of change in poverty levels for those spending more than R600 a month) is not subject to the choice of poverty line. Independently of any poverty line that we may choose, the result confirms that poverty levels declined or, at worst, did not increase in South Africa between 1995 and 2005.¹⁶

Figure 2 presents the CDFs for Africans with a real per capita expenditure of R1 000 a month or less in 2000 prices. In both years, as noted above, this accounts for about 90% of the African population in South Africa. In this case, our results are stronger, as the CDFs show that poverty undoubtedly declined independently of any poverty lines, with the 2005 CDF lying below the 1995 CDF at all points of the distribution. The gap between the two CDFs is also larger for Africans than at the national level across the distribution, illustrating the relatively larger decline in poverty levels experienced by Africans for any range of poverty lines.

Figure 2: *Cumulative distribution functions for Africans, 1995 and 2005*

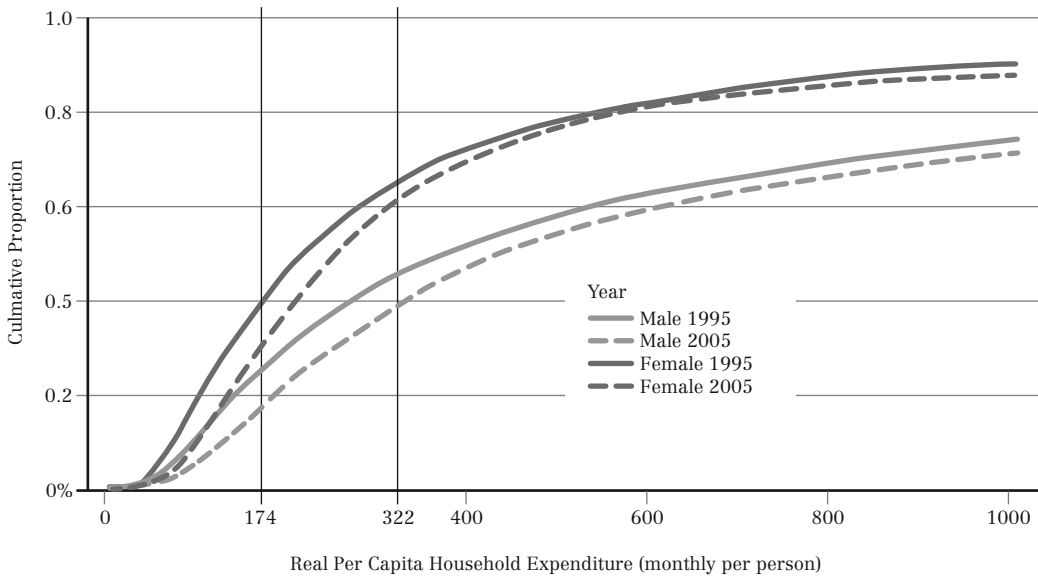
Source: Statistics South Africa (1995 and 2008) and own calculations.

Per capita expenditure as converted to real per capita expenditure (expressed in 2000 prices) using the Consumer Price Index. The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

The poverty estimates presented above show that households headed by women remained more vulnerable than those headed by men using both of our poverty lines. Figure 3 presents the CDFs for male- and female-headed households for 1995 and 2005 and captures this result, as the CDFs show that poverty declined for individuals living in both male and female-headed households in the ten-year period irrespective of any poverty line. The position of the CDFs also confirms the larger declines in poverty levels at the lower poverty line for female-headed households. It is also clear that in both years, the CDFs for male-headed households lie below those for female-headed households, confirming that at any chosen point of the expenditure distribution, individuals living in households headed by women experienced significantly higher absolute levels of poverty. In fact, in 2005, with the exception of the bottom 20% of the distribution, the CDF for female-headed households lies above the 1995 CDF for male-headed household, implying that for the most part people living in female-headed households were worse off in 2005 than those living in male-headed households in 1995.

Figure 3: *Cumulative distribution functions by gender of household head, 1995 and 2005*



Source: Statistics South Africa (1995 and 2008) and own calculations.

Notes: Per capita expenditure as converted to real per capita expenditure (expressed in 2000 prices) using the Consumer Price Index. The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

The additional value of the above analysis is that it is independent of much-debated poverty lines. Hence, to circumvent the use of poverty lines in our analysis of poverty, the standard methodology of stochastic dominance testing was applied. Our results clearly show that irrespective of the poverty line, the proportion of poor people either declined or remained constant in the first decade of democracy. Indeed, it is only at high poverty lines – in excess of R500 per month per capita – that poverty levels remained stagnant. Importantly, though, the more robust results are that African poverty levels, and poverty in female-headed households, declined significantly across any possible range of poverty lines. Despite these advances, however, race and gender continue to characterise poverty in post-apartheid South Africa.

Income inequality under democracy

While the first decade of democracy saw a decline in national poverty levels in both absolute and relative terms, the trends in income inequality are more worrying. On the basis of per capita expenditure, and using the Gini coefficient¹⁷ as a measure of inequality, the data suggests that South Africa experienced a rise in income inequality between 1995 and 2005. Specifically, the economy's Gini coefficient increased from 0.64 in 1995 to 0.69 in 2005.

This is a deeply disturbing result for a number of reasons. Firstly, the international experience is that measures of income inequality do not change significantly over time in either direction. It takes large shifts in economic growth, for example, to change an economy's income distribution or a particular pattern of growth. Secondly, the result is disturbing because historically, South Africa has been ranked as one of the world's most unequal societies. This new result suggests¹⁸ that it may now be one of the world's most consistently unequal countries. Simply put, while the democratic period has delivered declining poverty levels, it has also been marked by a significant rise in aggregate income inequality. The data by race, however, is interesting. While only Africans experienced a decline in poverty levels as measured by the head-count rate and the poverty gap ratio, the evidence presented in Table 3 suggests that they were the only population group that did not experience a significant increase in inequality between 1995 and 2005. African inequality, however, remained high in both years. Coloured people experienced the largest increase in inequality, with their Gini coefficient rising from 0.49 in 1995 to 0.58 in 2005. As a result, by 2005 the distribution for coloured people showed the highest level of inequality relative to the other race groups. Asian inequality rose from 0.45 to 0.53 in 2005. While white inequality rose from 0.39 to 0.45, this population group continued to experience the lowest relative levels of inequality.

Table 3: Inequality shifts by race: Gini coefficients for 1995 and 2005

Category	1995	2005
African	0.55	0.56
Coloured	0.49	0.58
Asian	0.45	0.53
White	0.39	0.45
Total	0.64	0.69

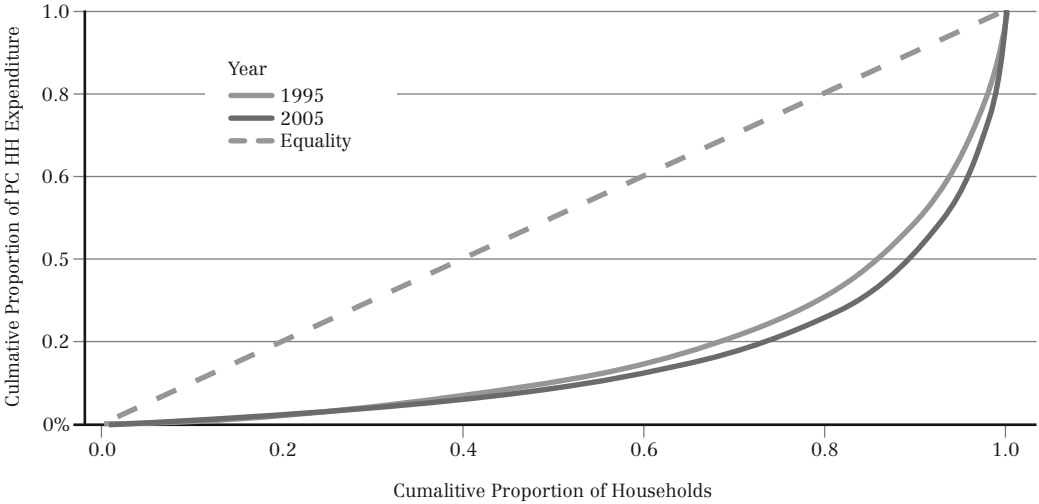
Source: Statistics South Africa (1995 and 2008) and own calculations.

The changes in the values of the Gini coefficients between 1995 and 2005 are statistically significant at the 95% level, with the exception of Africans. The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

The Lorenz curve¹⁹ in Figure 4 confirms that inequality at the national level increased between 1995 and 2005. As a complement to the Gini coefficient, the Lorenz curve represents an affirmation of the robustness of our national result. For example, the 1995 Lorenz curve indicates that in that year, the bottom 80% of the population accounted for just over 30% of total expenditure. By 2005, the Lorenz curve shows that this share of the population only accounted for about 25% of per capita household expenditure. Put differently, while in 1995 the richest 20% of the South African population accounted for about 70% of total expenditure, a decade into democracy this share had risen to 75%.

Figure 4: Lorenz curve for South Africa, 1995 and 2005



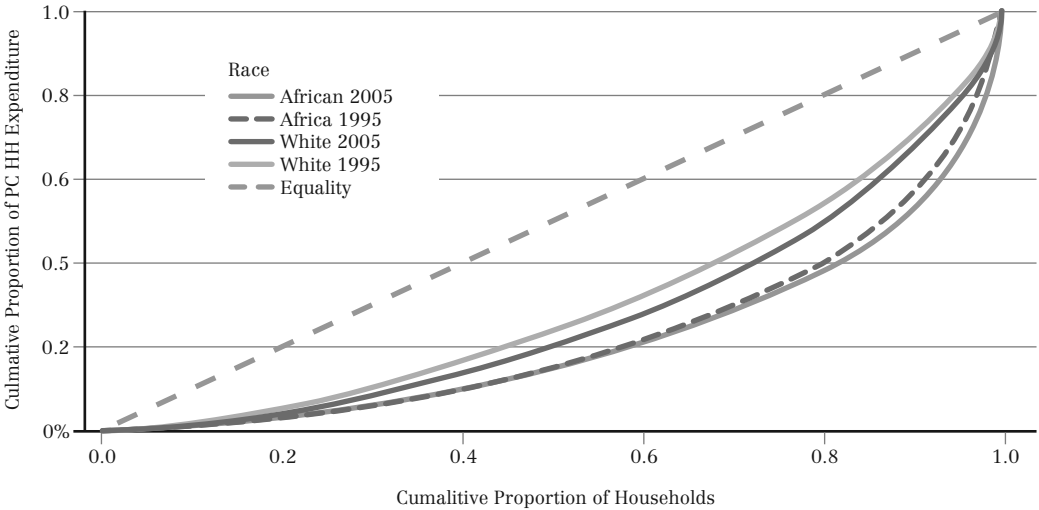
Source: Statistics South Africa (1995 and 2008) and own calculations.

The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

Figure 5 below presents the Lorenz curves for Africans and whites for 1995 and 2005. It is clear from the curves that African inequality remained virtually unchanged over the period, with the 1995 and 2005 Lorenz curves being almost indistinguishable. In contrast, the Lorenz curves for whites graphically confirm increasing inequality within this cohort over the period.

Figure 5: Lorenz curves for Africans and whites, 1995 and 2005



Source: Statistics South Africa (1995 and 2008) and own calculations.

The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

Finally, the relatively higher level of African inequality is also apparent, with both African Lorenz curves lying below the curves for whites in 1995 and 2005. For example, looking at the African Lorenz curves, the bottom 80% of the African population accounted for about 40% of total expenditure by Africans in both 1995 and 2005. The Lorenz curves for whites show that 80% of the population was responsible for about 55% of total expenditure in 1995. Ten years later, the same proportion of the white population group saw its share of total white expenditure decline to about 50%. In the South African context, the marked inequality between racial groups as a result of apartheid has always been a significant driver of aggregate inequality.²⁰ Studies using either the 1996 and 2001 census data or the 1995 and 2000 IES data have found an increase in the contribution of inequality within groups, driven to a large extent by increasing inequality in the African population.²¹ To estimate the drivers of inequality between and within groups, we have used the well-known Theil index.²² Indeed, older studies using pre-1994 data also suggest that inequality within racial groups has tended to drive aggregate inequality.²³ Given past conclusions in the literature, the results provided below are crucial. Our estimates suggest that over the 1995-2005 period, the share of inequality driven by the dynamic of intra-group inequality in fact declined,²⁴ while the contribution of inequality between race groups to overall inequality increased from 46.9% percent to 49.7%. In fact by 2005, inequality between and within groups contributed made an almost equal contribution to aggregate inequality.

Table 4: *Inequality within and between race groups, 1995 and 2005*

	1995	2005
By Race		
Within-group component	0.433 (53.15%)	0.511 (50.35%)
Between-group component	0.381 (46.85%)	0.504 (49.65%)
Total inequality (<i>Theil-T</i>)	0.814 (100%)	1.014 (100%)

Source: Statistics South Africa (1995 and 2008) and own calculations.

The population in 1995 has been weighted by population weights according to the 1996 census, while the population in 2005 has been weighted by the household weight multiplied by the household size.

The 2005 weights are based on the 2001 census.

It has not been possible to calculate confidence intervals or t-statistics for the Theil measures, meaning that it was not possible to assess whether the change in the contribution of the two components to total inequality is statistically significant.

This is a highly significant result, which suggests that it is mainly income differences between the race groups – rather than those within them – that have contributed to South Africa's growing inequality levels in the post-1994 era. In other words, the suggestion is that differential income gains and losses between racial groups, rather than within them, has driven the regular shifts in the post-apartheid period. Although it is not the focus of this chapter, this indicates that a reassessment is needed of the view that in the democratic era growing African affluence relative to rising African

unemployment rates has been a driver of aggregate income inequality in South Africa. Indeed, from this admittedly provisional evidence, it would appear that the contrasting income gains made across the different race groups has been the key determinant of rising aggregate income inequality in the South African economy.²⁵

The nature of economic growth: 1995-2005

There is very little, if any, debate among economists about the idea that high levels of economic growth are essential for poverty reduction. Indeed, increased growth rates measured by rising per capita incomes appear to make this link clear and simple: with higher economic growth, poverty levels will fall in a society. However, a more detailed assessment of the international experience suggests two very important caveats to the general view that “growth is good for the poor”. Firstly, the impact of economic growth on poverty differs significantly from country to country. World Bank research indicates that a two percent increase in growth rates will result in a reduction in poverty of between one and seven percent, depending on the country.²⁶ Secondly, as incomes grow, it is highly likely that the *distribution* of income will change – economic growth often brings with it some change in levels of income inequality. When this occurs and leads to increasing inequality, the gains that the poor make from growth may, in fact, be reduced. Higher inequality levels resulting from the adverse impact of growth on income distribution dilutes its impact on poverty. The point is that economic growth may be a necessary condition for poverty reduction in a society, but it is certainly not a sufficient condition.

In the analysis (in the second section), we noted the shifts in poverty between 1995 and 2005 using Foster, Greer and Thorbecke’s standard poverty measures. However, it is important to try to estimate how the growth in expenditure by poor people over this period has fared, relative to expenditure by the rich. As a starting point for the analysis, we examine growth incidence curves (GICs) for the period according to a set of covariates, drawing on the work of Ravallion²⁷ and Ravallion and Chen,²⁸ who developed the concept. The GIC approach allows us to determine whether growth in expenditure in this period has been pro-poor by plotting the growth in expenditure across each centile of the distribution. In the GIC for South Africa in 1995-2000, shown in Figure 6 we examine the growth in expenditure per capita of the population, arranged according to ascending centiles of the distribution.

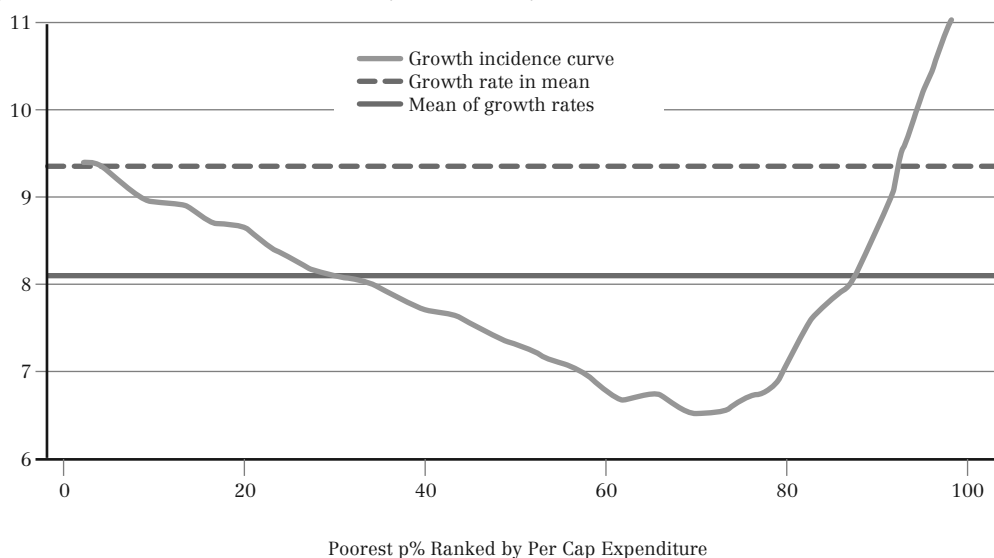
The GIC makes it clear that growth in per capita expenditure was pro-poor in the absolute sense, with all people across the distribution experiencing positive growth between 1995 and 2005. Pro-poor growth can be considered “absolute” if the change in expenditure and income levels of the poor over a given period, as defined by a chosen poverty line, is above zero, in other words, expenditure levels have increased in absolute terms. Pro-poor growth can be considered “relative” if the change in the income and expenditure levels of the poor is greater than that of people who are not poor. The average annual growth in mean per capita spending was just above nine

percent over the period, while the mean of the growth rates in each percentile was eight percent.

While people at the very bottom of the distribution clearly benefited more from the growth in spending than those up to the 70th percentile, this has not been pro-poor in a relative sense. Relative pro-poor growth was not evident, given that from around the 70th percentile, spending growth begins to increase steadily once more, with individuals in the top ten percent of the distribution enjoying the highest average annual growth rates in the society.

It is important to note that, at the bottom of the distribution, only the poorest 30% of people experienced average annual increases in spending above the mean of the percentile growth rates. Those between the 60th and 70th percentiles experienced the lowest growth rates – about six percent.

Figure 6: *Growth incidence curve for South Africa: 1995-2005*



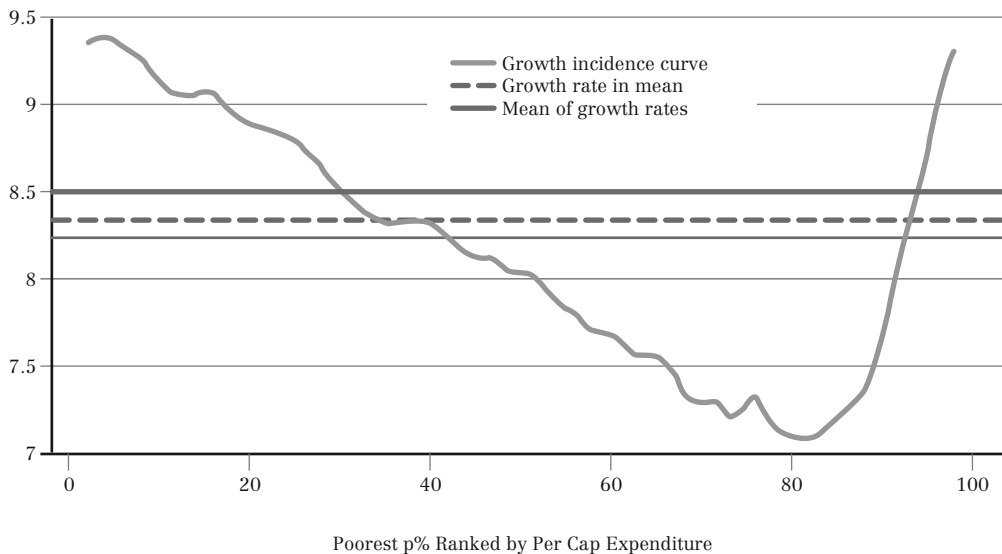
Source: Statistics South Africa (1995 & 2008), own calculations.

Frequency weights are assumed with the population in 1995 weighted according to the 1996 census, and the population in 2005 weighted according to the 2001 census.

Figures are annualised growth rates.

Figure 7 presents the GIC for Africans for 1995-2005. Again, it is clear that growth was pro-poor in an absolute sense. All Africans experienced an increase in their per capita expenditure over the ten-year period, with average annual growth rates varying between just under seven percent and more than 9.5%. While people at the bottom end of the distribution appear to have enjoyed the highest average annual growth rates of more than 9.5%, manual calculations of the growth rates at the top of the distribution reveal a growth rate of 10% in the 99th percentile.

Figure 7: *Growth incidence curve for people living in households headed by Africans: 1995-2005*



Source: Statistics South Africa (1995 and 2008), own calculations.

Frequency weights are assumed with the population in 1995 weighted according to the 1996 census, while the population in 2005 was weighted according to the 2001 census.

Figures are annualised growth rates.

In this case, individuals in the 80th percentile experienced the lowest average annual growth rates, of just below seven percent. Only about the poorest 40% of Africans experienced increases in expenditure above the mean of percentile growth rate, again confirming that growth was not pro-poor in the relative sense.

The GICs for the other three race groups are not shown here, but these confirm that all people regardless of race experienced increases in per capita expenditure, meaning that growth was pro-poor in absolute terms for all race groups between 1995 and 2005.

The GICs for the other population groups however, also suggest that those at the bottom of the distribution experienced relatively lower average annual growth rates in expenditure than those higher up the distribution. The evidence presented in Table 5 and Figure 8 below confirms this.

Table 5 gives the growth rate in mean and median expenditure, as well as the mean percentile growth rate at national level and for all four race groups. In addition, it presents the rate of pro-poor growth for the poorest 10%, 15%, 20%, 25% and 30% of the distribution.²⁹ Figure 8, in turn, presents the average annual growth rates at the very top of the per capita expenditure distribution for the four race groups.

Table 5: Measures of pro-poor growth by race, 1995-20

	Total	African	Coloured	Asian	White
Growth rate in mean	9.29	8.34	10.1	7.92	11.79
Growth rate in median	7.15	8.00	7.04	5.78	10.60
Mean percentile growth rate	8.00	8.23	8.19	6.42	10.83
Mean growth rate of the poorest percentiles of the populations					
0-10	9.19	9.50	5.75	3.29	8.15
0-15	9.09	9.40	6.07	3.61	8.49
0-20	8.98	9.32	6.27	3.73	8.54
0-25	8.86	9.25	6.37	4.11	8.64
0-30	8.73	9.15	6.44	4.36	8.79

Source: Statistics South Africa (1995 and 2008) and own calculations.

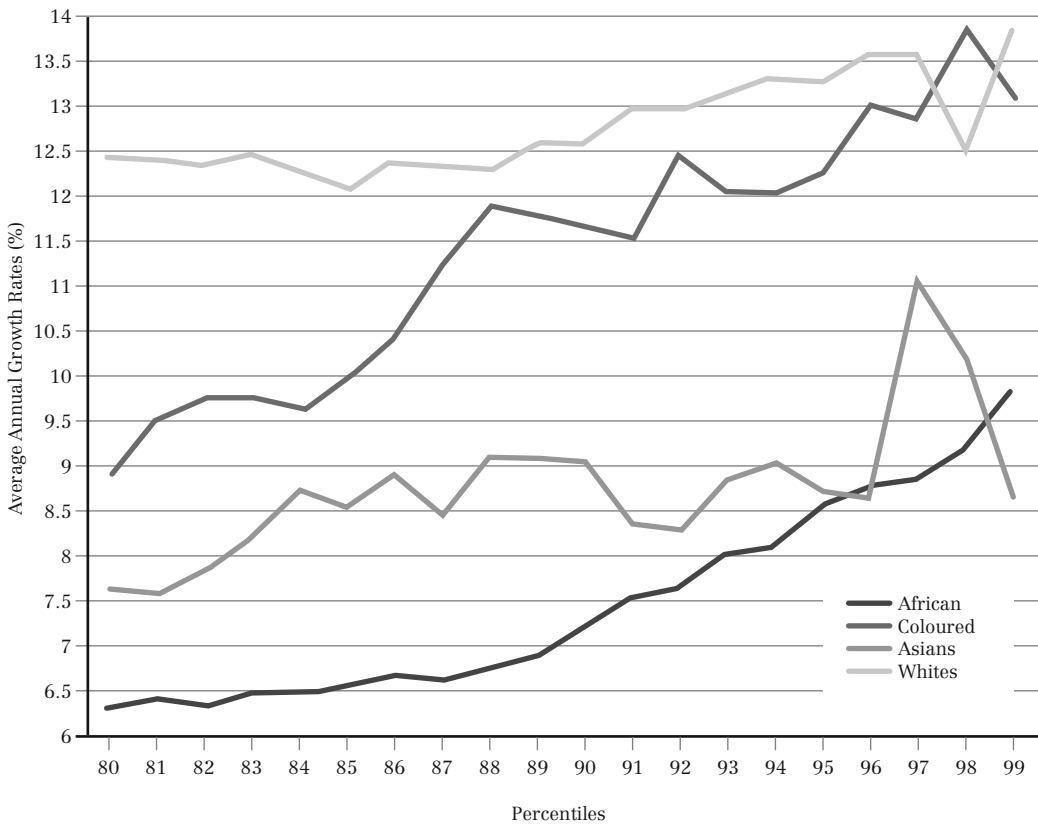
Frequency weights are assumed with the population in 1995 weighted according to the 1996 census, while the population in 2005 has been weighted according to the 2001 census.

Figures are annualised growth rates

In the aggregate and for Africans, the declining pro-poor growth rates as one moves from the tenth to the 30th percentile confirm that on those in the bottom 10% of the distribution experienced higher growth rates than those in the bottom 30%. At the national level and for Africans, the average growth rates for those in the bottom 30% of the distribution were, in fact, higher than the respective mean percentile growth rates. In the case of Africans, the average growth rate was even higher than the growth rate in mean expenditure. The pro-poor growth rates for coloureds, Asians and whites, on the other hand, show that people in the bottom 30% of the distribution experienced lower growth rates relative to the mean percentile growth rates. Asians generally experienced the lowest growth rates, while on average whites experienced the highest growth rates of all race groups.

The table below presents the results for growth rates for people from the 80th percentile upwards,³⁰ broken down by race group. In the case of coloured, Asian and white people, those at the top of the expenditure distribution experienced growth rates higher than the mean percentile growth rates of their race group, presented in Table 5. The data for the African population reveals that only those from the 93rd percentile upwards experienced growth rates above the mean percentile growth rates.

Figure 8: Average annual growth rates in expenditure at the top of the distribution, 1995-2005



Source: Statistics South Africa (1995 and 2008) and own calculations

Frequency weights are assumed with the population in 1995 weighted according to the 1996 census, while the population in 2005 was weighted according to the 2001 census.

Figures are annualised growth rates.

It is instructive to note that nowhere in the upper end of the distribution has African expenditure grown as rapidly as that of whites. Put differently, the estimates suggest that in 1995-2005, coloured and white individuals topped the expenditure distribution, continuing to benefit more from economic growth than those at the bottom end. At the aggregate level, these two race groups, and to a lesser extent Asians and Africans in the very top percentiles, accounted for the relatively higher growth rates in the top 10% of the distribution. Indeed, this racial difference in expenditure growth at the top end must partly explain the result mentioned earlier – of a rising share of inequality between groups in overall national income inequality.

The GICs for those living in male-headed and female-headed households respectively, while not shown here, again confirm that growth was pro-poor in an absolute sense for all South Africans between 1995 and 2005, irrespective of the gender of the household head. Both GICs show a similar trend to that of the GIC for the country. People living in both male- and female-headed households at the bottom of the distribution experienced higher growth rates than those up to about the 70th percentile

living in male-headed households and those up to the 80th percentile living in female-headed households.

Table 7 reflects pro-poor growth measures for individuals living in male-headed and female-headed households. The table confirms the GIC results that male-headed households experienced a slightly higher growth rate in mean expenditure, as well as a higher mean of growth rates. In addition, the pro-poor growth rates for people in the bottom 30% of the expenditure distribution also confirm that those living in relatively poorer male-headed households experienced slightly higher growth rates than those living in poor households headed by women.

Table 7: *Measures of pro-poor growth by gender of household head*

	Total	Male-headed	Female-headed
Growth rate in mean	9.29	10.14	9.53
Growth rate in median	7.15	7.59	7.75
Mean percentile growth rate	8.00	8.79	8.27
Rate of pro-poor growth at corresponding percentile			
10	9.19	9.44	9.32
15	9.09	9.39	9.23
20	8.98	9.31	9.18
25	8.86	9.20	9.10
30	8.73	9.10	9.00

Source: Statistics South Africa (1995 and 2005) and own calculations.

Frequency weights are assumed with the population in 1995 weighted according to the 1996 census, while the population in 2005 has been weighted according to the 2001 census.

Figures are annualised growth rates.

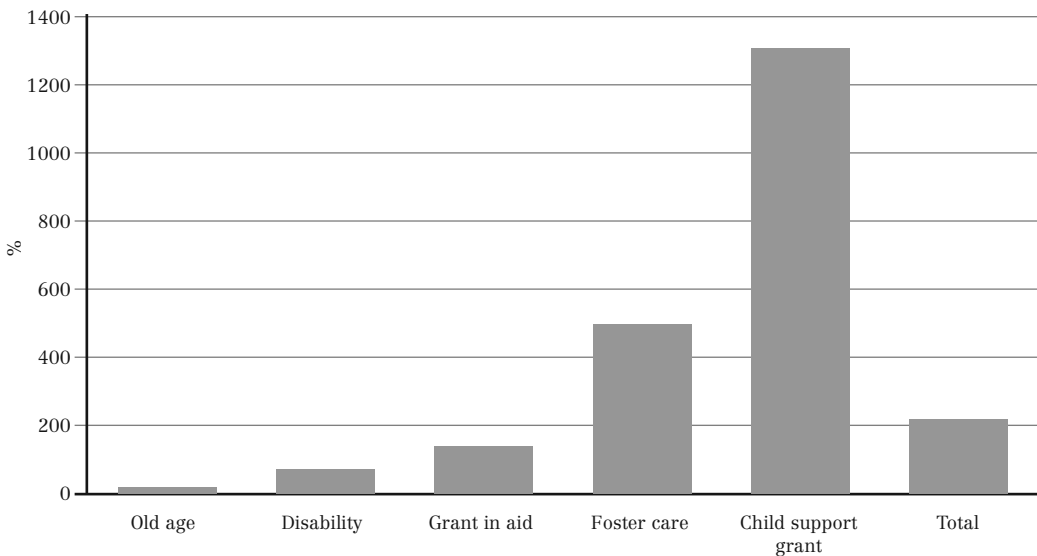
As at national level, people at the very top end of the distribution experienced the highest growth rates, regardless of the gender of the head of the household in which they lived. Overall, the results presented here suggest that all people, regardless of race and the gender of the household head, experienced positive growth in their levels of expenditure in the first decade of democracy. The GIC curves suggest that those at the bottom and very top of the distribution experienced the highest growth rates. The growth in the expenditure of the rich, however, exceeded growth at the bottom end of the distribution, fuelling the rise in income inequality. Indeed, the stagnation in expenditure growth in the middle of the distribution is arguably a key element in the rising Gini coefficient in the democratic era, but may also suggest that employed, blue-collar households may have been excluded from the growth process. Growth has, therefore, been pro-poor in the absolute but not the relative sense. Pursuing this line of argument for the middle of the distribution is extremely difficult, given the nature of data at our disposal and some challenging analytical issues. But the changes at the bottom of the distribution are just as important. For this reason, we will give detailed consideration to the changes revealed by the results. In particular, we will focus on the role of government's provision of social grants in raising expenditure by the poor over the period.

Determinants of growth in expenditure of the poor since 1995

The first decade of democracy in South Africa has seen a rapid widening and deepening of the state social security system. Social grants target the most vulnerable members of society, specifically the disabled, the aged and children. Pauw and Mncube's analysis³¹ shows that not only has social grant expenditure as a proportion of GDP increased significantly since the first democratic election, but also that the number of recipients of social grants has more than trebled. In 1996/97, social grant transfers accounted for about 2.5% of GDP and by 2005/06 this share had increased to more than three percent. The total number of beneficiaries increased from about three million in 1997 to 9.4-million in 2005, an increase of 217%, or an average annual growth rate of 15.3%.

Figure 10 illustrates the growth rate in beneficiaries according to the type of grant. (The absolute numbers can be found in Appendix 2)

Figure 10: *Growth in number of grant beneficiaries by type of grant, 1997–2005*

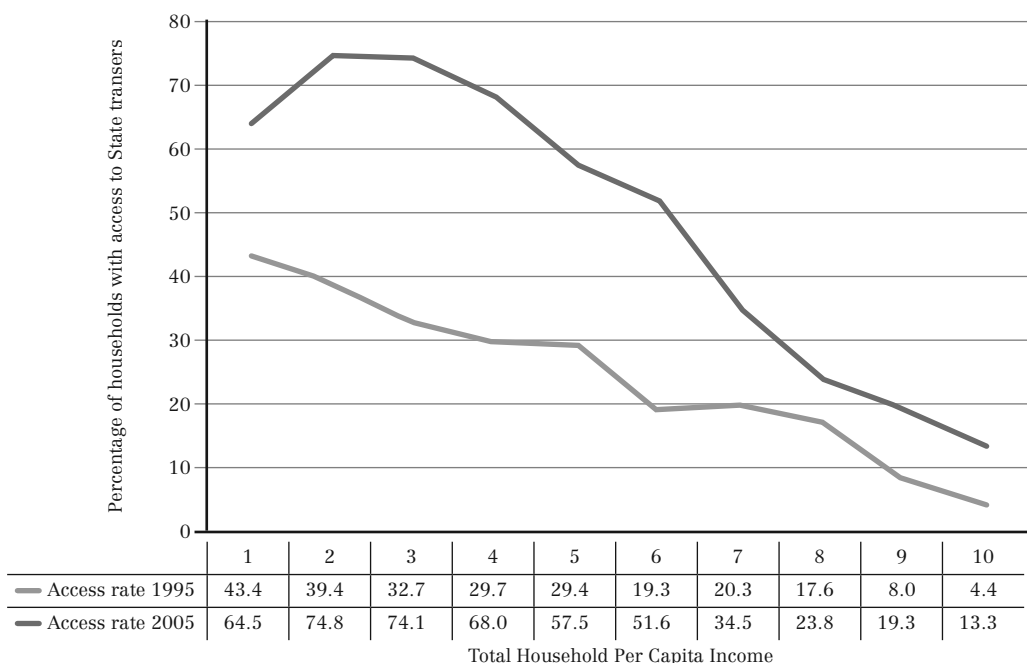


Source: Pauw & Mncube (2007); own calculations.

Most of the increase in the provision of social grants occurred after 2000, mainly driven by the extension of child support grants to children up to 14 years of age and increased public awareness of grants.³² The number of recipients of child grants increased from 400 500 in 1997 (when it was called the child maintenance grant) to 5.6 million in 2005 – an increase of more than 1 300%. While the increase in the number of those receiving the old age grants was relatively small, the grant has the largest number of recipients, with more than two million people receiving it by April 2005.

Figure 11 shows the share of households in each per capita household income decile with access to one or more social grant increased between 1995 and 2005. Put differently, the graph presents the household access rate to social grants in each income decile for the two years.

Figure 11: *Household access to state grants per household income deciles, 1995 and 2005*

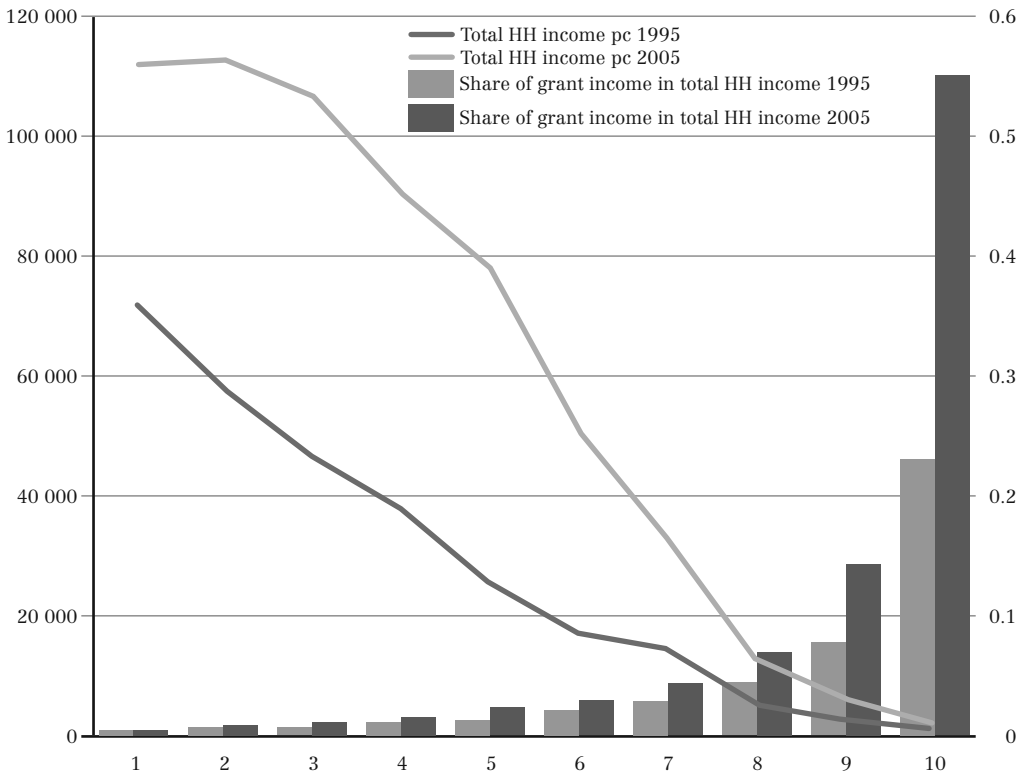


Source: Statistics South Africa (1995 and 2008) and own calculations.

The population in 1995 has been weighted according to the 1996 census, while the population in 2005 has been weighted according to the 2001 census. In both datasets, the population has been weighted by the household weight multiplied by the household size.

There has been a substantial increase in household access to social grants in each of the income deciles between 1995 and 2005. For example, the share of households in the first decile with access to grant income increased from 43% in 1995 to almost 65% in 2005. However, access to grant income not only increased significantly in the bottom deciles, but also in the deciles in the middle of the income distribution. For example, in the sixth decile, the proportion of households with access to grant income increased from 19% to more than 50% in 2005. This important finding suggests that grant income supports not only the very poor, but also a large number of households in the middle of the distribution. In fact, between 50% and 75% of households in the bottom six deciles of the distribution received grants in 2005. The graph above shows the impact of the provision of social grants in terms of the share of households with access to grants. Figure 12 shows the share of total income in each of the total households per capita deciles that can be attributed to social grants in 1995 and 2005. Clearly, in line with increased access to social grants, the contribution of grant income to total income increased significantly over the period.

Figure 12: *Per capita grant income as a proportion of total household income, South Africa, 1995 and 2005*



Source: Statistics South Africa (1995 and 2008) and own calculations.

The population in 1995 has been weighted according to the 1996 census, while the population in 2005 has been weighted according to the 2001 census. In both datasets, the population has been weighted by the household weight multiplied by the household size.

In 1995, the contribution of grant income to total household income was relatively low in all deciles. Even in the bottom decile, grant income only contributed about 35% to total income. This declined across the income distribution, with grant income accounting for just over 10% of total income for those in the fifth decile. By 2005, grant income was making an important contribution to total income in all the lower income deciles. For households in the bottom three deciles, grant income contributed between 50% and 60% to total household income. We saw earlier that more than half the households in the middle of the income distribution received some grant income in 2005. The results above confirm the importance of social grant income to those households, accounting for almost 40% of total income of households in the fifth income decile.

On the basis of the preliminary evidence presented here, our proposition is that the rapid widening and deepening of the state's social security system in the first decade of democracy lies at the heart of the rapid growth in expenditure levels of the poor. Child support grants, old age pensions and disability grants are probably the key factors in South Africa's absolute levels of pro-poor growth in 1995-2005. The growth

at the bottom end however, must be contrasted with the phenomenal growth rates observed among people in the 80th percentile and upwards, to which social grants did not contribute. That this trend shows higher returns for whites and coloureds is a stark reminder both of the distributional consequences of economic growth and its powerful racial manifestations.

Conclusion

Analysts agree that persistent and high levels of poverty and particularly inequality can undermine the quality of democracy and lead to social conflict. In a worst-case scenario, high levels of poverty and inequality could threaten the survival of democracy. There is also consensus that economic growth alone is not enough to guarantee the sustainability of a democracy and that the equitable distribution of income, assets, education and other opportunities is important for both the quality and endurance of democracy. This chapter suggests six noteworthy trends that highlight changes and challenges in South Africa's second decade of democracy. Firstly, it is clear that gains in poverty reduction have been recorded in the first decade of democracy at the national level and for African-headed and female-headed households, and that this result is independent of the choice of poverty line. Secondly, however, the results show that race and gender remain overwhelming determinants of this poverty profile, with African-headed and female-headed households having a disproportionate share of poverty. Thirdly, the trends in income inequality suggest that one of the world's most unequal societies may have become the most unequal. Our fourth key finding is that income inequality between racial groups – to all intents and purposes, between Africans and whites – is driving this overall increase in inequality. Our analysis suggests that despite positive economic growth since 1995, people at the top end of the distribution have gained most from post-apartheid growth. It also suggests that the country's current democratic growth model is crafted around supporting incomes at the bottom end of the distribution through an extensive social transfer programme, while offering few benefits to those in the middle of the distribution. The growth in the expenditures of the poor has been driven by the expansion of social grants. As South Africa enters its first post-1994 recession, with declining tax revenues and rising fiscal deficits, it is unclear whether such a growth model is desirable or sustainable.

In summary, positive economic growth during the first decade of democracy in South Africa has resulted in modest gains in poverty reduction. However, inequality has increased significantly, suggesting a possible threat to at least the quality of democracy in the country. In the longer term, persistently high levels of inequality may give rise to social conflict and ongoing challenges around the nature and trajectory of the country's growth path.

Appendix 1

Shares in Population and Poverty: By Race and Gender of Household

	1995			2005		
	Population Share	R322 Poverty Line	R174 Poverty Line	Population Share	R322 Poverty Line	R174 Poverty Line
Race						
African	77.28%	92.74%	95.45%	79.40%	93.19%	94.98%
Coloured	9.31%	6.92%	4.40%	8.79%	6.30%	4.83%
Asian	2.61%	0.23%	0.07%	2.48%	0.43%	0.17%
White	10.79%	0.11%	0.08%	9.23%	0.07%	0.03%
Gender of Household Head						
Male	66.18%	57.74%	55.91%	56.50%	45.42%	42.63%
Female	33.82%	42.27%	44.09%	43.43%	54.53%	57.29%

Poverty lines are in 2000 prices.
The population in 1995 has been weighted by population weights according to the 1996 census. The population in 2005 has been weighted by the household weight multiplied by the household size. The 2005 weights are based on the 2001 census .

Appendix 2

Social Grants Beneficiary Numbers by Type of Grant

Type of Grant	August 1997	April 2001	April 2005
Old Age	1 742 253	1 877 538	2 093 075
War Veterans	11 495	6 175	3 340
Disability	754 830	627 481	1 307 459
Grant in Aid	9 720	9 489	23 131
Foster Care	42 917	85 910	256 325
Care Dependency	3 815	28 897	85 818
Child Support	400 599	974 724	5 633 647
Total	2 965 629	3 610 214	9 402 795

Pauw & Mncube (2007), calculated using data from National Treasury.
The child support grant was introduced in 1998, the 1997 beneficiaries shown in the table therefore corresponds to the child maintenance grant.

ENDNOTES

- 1 Respectively Professor, School of Economics, and Senior Researcher, Development Policy Research Unit, University of Cape Town
- 2 See, for example, N Bermeo 'Does Electoral Democracy Boost Economic Equality?' *Journal of Democracy*, Vol 20 No 4, October 2009, pp.21-35; EB Kapstein and N Converse 'Why Democracies Fail' *Journal of Democracy*, Vol 19 No 4, October 2008, pp.57-68. JM Well and J Kriekhaus *Equity and Democratic Consolidation: Does Income Inequality Reduce Support for Democracy?* Paper prepared for presentation at the 2006 annual meeting of the Midwest Political Science Association, April 20-23, Chicago, Illinois
- 3 N Bermeo 'Electoral democracy'
- 4 JM Well and J Kriekhaus 'Equity and Democratic Consolidation'
- 5 EB Kapstein and N Converse 'Why Democracies Fail'
- 6 F Fukuyama 'The Latin American Experience' *Journal of Democracy* Vol 19, No 4, October 2009, pp.69-79
- 7 P Lewis 'Growth without Prosperity in Africa' *Journal of Democracy*, Vol 19, No 4, October 2008, pp.95-109
- 8 J Hoogeveen and B Özler 'Not Separate, Not Equal: Poverty and Inequality in Post-Apartheid South Africa' in H Bhorat and R Kanbur *Poverty and Policy in Post-Apartheid South Africa*, Pretoria, HSRC Press, 2006; M Leibbrandt, J Levinsohn and J McCrary 'Incomes in South Africa'; M Leibbrandt, L Poswell, P Naidoo, M Welch, and I Woolard *Measuring Recent Changes in South African Inequality and Poverty using 1996 and 2001 Census Data* Development Policy Research Unit Working Paper No 05/94, Cape Town, University of Cape Town, June 2005
- 9 J Hoogeveen and B Özler 'Not Separate, Not Equal'
- 10 S van der Berg 'Public Spending and the Poor Since the Transition to Democracy' in H Bhorat and R Kanbur *Poverty and Policy in Post-Apartheid South Africa*, HSRC Press, Pretoria, 2006
- 11 J Hoogeveen and B Özler 'Not Separate, Not Equal'; Leibbrandt, Levinsohn and McCrary 'Incomes in South Africa'; M Leibbrandt, L Poswell, P Naidoo, M Welch and I Woolard 'Measuring Recent Changes'
- 12 All poverty and inequality measures are individual measures, calculated using per capita total household expenditure. Per capita total household expenditure was created by dividing total household expenditure by the number of people in the household (or household size).
- 13 JE Foster, J Greer, and E Thorbecke 'A Class of Decomposable Poverty Measures' *Econometrica*, Vol 52, 1984
- 14 Our analysis uses two standard poverty lines. The R322 line (in 2000 prices) has been derived using a cost of basic needs approach, while the R174 line is equivalent to \$2 dollar a day (again in 2000 prices) (See J Hoogeveen and B Özler 'Not Separate, Not Equal'). The 2000 poverty lines were adjusted for the impact of inflation both in 1995 and 2005, and these adjusted poverty lines were used to calculate the poverty measures for the two years.
- 15 Statistics South Africa *Income and Expenditure Survey 1995*, data set; Statistics South Africa *Income and Expenditure Survey 2008*, data set
- 16 The two vertical lines in Figure 1 represent the lower and upper poverty lines stipulated at the outset. Note that the larger gap between the 1995 CDF and the 2005 CDF at the R174 poverty line confirms the larger decline in poverty as measured by the R174 headcount rate relative to the R322 poverty line, illustrated in Table 1 above.
- 17 The Gini coefficient is one of the most commonly used measures of inequality, as it is relatively easy to understand and interpret. The possible values of the Gini coefficient can range from zero to one, with zero implying perfect equality. The higher the Gini coefficient, therefore, the higher the level of inequality.
- 18 R Kanbur 'Growth, Inequality and Poverty: Some Hard Questions' *Journal of International Affairs*, Spring 2005
- 19 The Lorenz curve is a graphical representation of the relationship between the cumulative percentage of income and the cumulative percentage of (ordered) population. The curve starts at the origin, the point where zero percent of the population receives zero percent of income, and ends at the point where 100% of the population enjoys 100% of income. The more unequal a society, the smaller the proportion of income that accrues to the poorest segment of the population and, accordingly, the lower the Lorenz curve will be on the figure. At its most extreme – perfect inequality – one person receives all the income and all others receive nothing. The Lorenz curve will therefore proceed horizontally from the origin, remaining on the horizontal axis until the last person is added to the cumulative shares, resulting in the curve going up almost vertically to the point where

- 100% percent of the population receives 100% of income (forming, in other words, a reverse “L” shape). Conversely, a situation of perfect equality will see each person receiving the same income and, thus, the poorest 20% of the population will receive 20% of income; the poorest 40% of the population will receive 40% of income, and so on. In this case, the Lorenz curve will form a straight diagonal line from the origin to the point where 100% of the population receives 100% of income. This line is known as the line of perfect equality.
- 20 M Leibbrandt, I Woolard and H Bhorat ‘Understanding Contemporary Household Inequality in South Africa’ in H et al. (eds.) *Fighting Poverty: Labour Markets and Inequality in South Africa*, Landsdown, UCT Press, 2001
 - 21 J Hoogeveen and B Özler ‘Not Separate, Not Equal’; M Leibbrandt et al. ‘Incomes in South Africa’
 - 22 The Theil index is a well-known measure of inequality that, unlike the Gini coefficient, makes it possible to measure the contribution of inequality within and between groups to overall inequality.
 - 23 M McGrath and A Whiteford ‘Inequality and the size distribution of income in South Africa’ *Occasional Paper No 10*, Stellenbosch Economic Project, 1994
 - 24 The Theil index numbers are presented in the table with the share contribution of the components in brackets.
 - 25 The results by gender of household head show that while declining very slightly over the period, inequality within groups has been almost the sole driver of total inequality over the period. In other words, the inequality between male-headed and female-headed households contributed very little to overall inequality.
 - 26 M Ravallion ‘Growth, Inequality and Poverty: Looking Beyond Averages’ *World Development* 29, pp.1803-1815, 2001
 - 27 M Ravallion, ‘Pro-poor Growth: A Primer’ *World Bank Policy Research Working Paper 3242*, March 2004
 - 28 M Ravallion and S Chen ‘Measuring Pro-poor Growth’ *Economic Letters*, 78 (1), pp.93-99, 2003
 - 29 The pro-poor growth rate is the annualised mean growth rate of the poor. This gives the annualised change in the Watts index divided by the headcount index at each given percentile. See M Ravallion and S Chen ‘Measuring Pro-poor Growth’
 - 30 Note that this differs from the pro-poor growth rates in Table 5 in that these are not averages across percentiles, but the actual average annual growth rates in each of the percentiles from 80 to 99.
 - 31 K Pauw and L Mncube ‘Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints’ *Development Policy Research Unit Working Paper 07/127*, Cape Town, University of Cape Town, 2007
 - 32 K Pauw and L Mncube ‘Expanding the Social Security Net’

BUILDING A PUBLIC SERVICE THAT CAN DELIVER CHANGE

BY RAENETTE TALJAARD

Introduction

South Africa's public service stands at a crossroads. It is the government's main instrument in building a "developmental state", yet it suffers from a host of institutional challenges, ranging from skills deficits and vacancy rates to ongoing transformation in the context of the restructuring of the macro-level of the state and ethical problems, and amid growing corruption.

At stake is the very stability of the country, as the public service is the face and hands of the state. It must reach into communities that still often define their citizenship in oppositional terms, believing that the only way to attract the state's attention when the public service fails is through violence.

The flare-up of service delivery protests has highlighted the distance between the people and elected public representatives. But it also poses a fundamental challenge to the state to improve the competency and the reach of the public service, so that it can meet the growing demands of a restive populace that has patiently awaited the liberation dividend of improvements in their socio-economic conditions. Fifteen years after liberation, too many South Africans remain marginalised.

There can be no dispute that the public service has made strides since the advent of democracy. But the challenges of democracy have raised questions about the effectiveness and modernity of the public service and its ability to respond to the needs of citizens.

Given the tone of statements by President Jacob Zuma, African National Congress (ANC) secretary-general Gwede Mantashe and Congress of South African Trade Unions (Cosatu) general secretary Zwelinzima Vavi, it seems clear that public servants will face new pressures to put the public first. Mantashe has flayed public sector unions for putting their interests before those of the public that they are meant to serve. Such declarations may make for interesting politics in the tripartite alliance, but they are also directly relevant to the core theme of service that needs to be reclaimed in the public sphere.

Critics and analysts may dismiss such statements as political rhetoric, but it does seem that there has been a change of emphasis. Reviewing the progress of the Presidency's public liaison and hotline service, launched in early October 2009, President Jacob Zuma restated what is required:

The long-term solution is that the public service needs to change the way it works and the attitude towards the public. We have started meeting with senior public servants to explain our vision and what change we expect ... We want them to know that people come first in everything we do, and we want excellence. There is no place for complacency, cynicism or excuses.¹

These sentiments were also expressed when the Department of Public Service and Administration marked its tenth anniversary. As its 2006/7 annual report makes clear, the department has seen a number of changes in emphasis over the years, with its mandate changing from policy development to consolidation and implementation. The report states that service delivery improvement and accountability remain central to the department's core business, but also that it has become an increasingly important agent of poverty alleviation in rural, poor and marginalised communities.²

Chapter 10 of the Constitution spells out the basic values and principles that govern the public service (section 195) and creates a constitutionally enshrined independent and impartial body, the Public Service Commission (PSC), responsible for very broad oversight of the public service (section 196). Section 197 of the Constitution sets out the broad empowering provisions that created scope for the national legislative framework for the public service, and the subsequent legislation – the Public Service Act of 1994, as amended by the Public Service Amendment Act No. 30 of 2007, and the various regulations adopted and amended since 2001. Section 197 (3) also enshrines the political neutrality of the public sector.

Academics have probed the extent to which the South African public sector has adopted the key doctrinal elements and features of New Public Management (NPM) reforms that have seen the significant reinvention of government and governance in other jurisdictions. At issue is the assumption that NPM reforms may help to promote a public service culture that prioritises service delivery by putting citizens, as the clients of key services, first.

According to Cameron,³ NPM reforms have had some influence on the South African public service, including such core features as the decentralisation of authority, downsizing, corporatisation, the creation of a clearly-defined Senior Management Service (SMS) and the introduction of performance contracts and slightly more flexible human resource practices. Cameron concludes that "in some cases there has been limited reform only. Arguably, traditional public administration has not only survived but in some ways has been enhanced". This can be clearly seen in the inadequate compliance of heads of department with the new NPM culture of performance contracts, and in levels of non-compliance with this core NPM requirement among public servants.

Indeed, the centralisation-decentralisation questions that are central to all the literature on NPM remain crucial in understanding the public sector restructuring of the early 1990s and the government's goal of a single public service. In a study of the draft Public Administration Management Bill, Naidoo⁴ points out⁵ that the legislation will cause tensions by instituting measures that give public service managers greater authority and discretion over human resources and organisational conduct, while simultaneously introducing centrally determined measures to ensure that they are held accountable. The argument is that the draft Bill's human resource management reforms create a dilemma: in theory, it would create the possibility of bureaucratic constraints, necessitated by the need for accountability, at the same time as strengthening the authority delegated to line department managers over human resource management and related organisational matters. Further compounding such management dilemmas will be high vacancy rates in the public service.

As South Africa's public service moves beyond its 15th anniversary, it confronts a period of significant change and restructuring. It seems clear that the renewed emphasis on the creation of a single public service presupposes a significant restructuring of the macro-structure of government and the allocation of powers and functions to its three spheres.

Indeed, Zuma clearly underscored these changes when he addressed Parliament in his first state of the nation address on 3 June 2009:

To ensure that all three spheres – local, provincial and national – improve service delivery, we will speed up the establishment of a single public service. This administration will insist on putting people first in service delivery. We will ensure courteous and efficient service from front-counter staff in the provision of services in all government departments.

The suggestion is that the post-1996 constitutional dispensation for the public service faces significant challenges, many of them constitutionally-related, in the form of restructuring, and that the service will have to undergo broader institutional and cultural renewal. This will have to emphasise a people-centred approach to service delivery that reaches beyond mere lip-service to the core injunction that flows from the nine principles enshrined in section 195(1) of the Constitution, and truly build a more interactive government at the coalface of public service delivery.

The contentious debate about NPM reforms again becomes relevant in this regard, as it goes to the heart of questions about the institutional culture of the public service. Compounding these have been recent reports of civil servants abusing their public positions by pursuing their own interests.

Examining the institutional culture of the public service, Chipkin⁶ underscores debates about the "transformation" of the state and the role of NPM in this broader discourse:

To begin with, the meaning of 'transformation' is caught between two imperatives that in the current situation seem to be at odds with one another. The first concerns the need to improve the efficiency and effectiveness of the state. The second is about achieving demographic representation in the public service. Although it is common in South Africa to debate the relationship between the two variables, their relationship is in fact mediated by a third factor – the rise of New Public Management (NPM) in the South African public service.

Chipkin argues that because of restructuring, the senior management echelons of the public service have grown dramatically as part of NPM-related reforms, despite a contraction in overall public service numbers. He makes the somewhat contentious claim that the simultaneous pursuit of policies of redress has created additional weaknesses in the state, and makes a passionate plea for a thorough re-conceptualisation of the form of the state and how the public service operates:

While race and redress are frequently debated, the effects of moving away from public administration to public management, or NMP, are barely raised – and yet the weakening of the state in the current situation is an effect of the unwitting consequences of their simultaneous pursuit. Affirmative action, in itself, is not the major obstacle to state performance. And service delivery will not improve through skills development or better payment of officials. What is required is rethinking the form of the state and how its public service operates. There are undeniable advantages of a senior cadre of public service managers, but so too is there in the strictly meritocratic recruitment of public servants. There is much that can be done in the meanwhile, including refining job descriptions and the skills required for them, and distinguishing between administrative, managerial and analytical competencies.

A shocking report by the Auditor-General⁷ based on performance audits of entities that are connected with government employees while doing business with national departments, as well as hearings of Parliament's Select Committee on Public Accounts (Scopa) and a debate in the National Assembly, have highlighted the fact that the ethical questions must form a significant part of the recalibration of the public service. Further underscoring this was the PSC Overview of the Implementation of the Financial Disclosure Framework for the 2007/8 financial year, which found that there is widespread non-compliance with the requirement that public servants disclose outside interests.

It is encouraging that President Zuma has made it clear that the corrosive influence of corruption will not be tolerated. In response to a parliamentary question⁸ by Congress of the People (Cope) leader Mvume Dandala on whether government will act to curb conflicts of interest and bring corrupt public servants to book, he said:

Let me state that this administration will not condone or tolerate any conduct by public officials that breaks the law or regulations that govern the public service. We view the report of the Auditor-General on public servants that do business with government without following proper procedures in a very serious light. I have instructed the ministers in whose departments such officials are employed to investigate the alleged misconduct. I have made it clear that where wrongdoing is found to have been committed, they must take necessary corrective steps, including taking disciplinary measures against the officials concerned.

Such a commitment takes on additional significance given the focus in the PSC's State of the Public Service Report 2009 on the state of readiness for the 2010 Fifa World Cup, which offers a host of opportunities for conflicts of interest and corruption.

It also seems clear that the Minister of Finance, Pravin Gordhan, will place renewed emphasis on a "value-for-money" approach to public service delivery that will seek to minimise the unwise and fruitless spending of public funds in a context of shrinking government revenues and growing demands on the fiscus.

A near-permanent revolution: public service restructuring

Arguably, one of the most important constitutional developments is the inclusion of a clear set of key principles governing the public service. At the heart of these is the transformation of the public service from the state machinery of colonialism and apartheid into a differently focused entity based on core values. As former presidential adviser Joel Netshitenzhe has argued, the country "cannot lay hold of an apartheid or colonial state machinery and try to use it to achieve what would in fact be an antithesis of what that state was".⁹

The PSC, established by section 196 of the Constitution, oversees the nine constitutional principles that govern the public service. To monitor the progress of the service in realising and complying with these principles, the commission has published regular State of the Public Service Reports since 2002. The crucial seventh report, published in 2008,¹⁰ is discussed in greater detail below. In this, the commission conducted a comprehensive mid-term review of public service transformation that looked at the full transformation process since the advent of democracy.

The key constitutional principles that guide the actions of the public service are:

- A high standard of professional ethics must be maintained;
- Efficient, economic and effective use of resources must be promoted;
- Public administration must be development-orientated;
- Services must be provided impartially, fairly, equitably and without bias;

- People's needs must be responded to and the public must be encouraged to participate in policy-making;
- Public administration must be accountable;
- Transparency must be fostered by providing the public with timely, accessible and accurate information;
- Good human resource management and career development practices, to maximise human potential, must be cultivated;
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation.

The service has seen a variety of significant restructuring and reconfiguration phases as part of the country's transition to democracy. These could be classified in three epochs, each posing its own challenges: the rationalisation and policy development phase (1994-1999), the policy development phase (1999-2004), and the modernisation and implementation phase (2004 to the present).

A key focus of phase one lay in building the ideals of reconciliation and rainbow-nation thinking into the public service, which involved the complex amalgamation of 11 disparate, racially-determined and ethnically-based public services, the legacy of a territorially balkanised past, into a coherent whole.

This painful rationalisation had the twin objectives of inculcating a new culture and rationalising regulatory and legislative frameworks, and culminated in the White Paper on the Transformation of the Public Service, which had eight key transformative objectives:

- Rationalising and restructuring the public service;
- Institution-building and management to promote greater accountability and organisational and material effectiveness;
- Representivity and affirmative action;
- Transforming service delivery to meet basic needs and redress past imbalances;
- Democratisation of the state;
- Human resource development;
- Improved employment conditions and labour relations; and
- The promotion of a professional service ethos.

This process culminated in the Public Service Act (Act No. 103 of 1994).¹¹ These broad norms were rapidly followed by the final Constitution, the White Paper on Transforming Public Service Delivery and the White Paper on Affirmative Action in the Public Service, laying a solid foundation for an institutionally unified public service during the second term of the democratic government.

The second phase of transformation was marked by modernisation, in the form of more extensive legislative and regulatory frameworks and the development of a

decentralised model of implementation in line with the NPM approach of improving managerialism and allowing managers to manage. Regulations¹² were enacted in accordance with the Public Service Act, and on the expenditure front the Public Finance Management Act and Treasury regulations replaced outdated legislative measures and created a clear framework for senior management accountability, and specifically heads of departments in their capacity as accounting officers. Department heads became more powerful in a decentralised model of governance.

In his 2000 state of the nation address, former president Thabo Mbeki highlighted a number of ongoing challenges in transforming the public service. These included:

- Rightsizing the public service (creating the right balance between redundancies and vacancies that arise in other areas of the service);
- Raising the skill levels of public servants and retaining skilled staff;
- Improving management, financial accountability and service delivery;
- Combating corruption and the abuse of public resources;
- Improving efforts to further motivate public servants and improve their morale; and
- Increasing the proportion of public funds spent on investment as opposed to consumption expenditure (striking the right balance between spending on salaries and capital spending).

The PSC points out that this period clearly showed the extent to which the gap between policy and implementation affected the core of government, as the public service continued to struggle with implementation and adherence to the policies and regulations put in place as part of transformation and modernisation. “Adherence to key pieces of legislation remained inadequate, and capacity constraints slowed down the implementation of departmental plans and programmes,” it says.¹³

As the third phase of public sector transformation and modernisation approached in 2004, when the third democratic government took office, it seemed clear that the implementation and modernisation of public service delivery would be core challenges for the new administration.

The Ten Year Review emphasised that key policy frameworks were in place and that implementation had become the crucial bugbear holding back government’s efforts to build a public service more responsive to citizens.¹⁴

In its third State of the Public Service Report in 2004, the PSC specified areas it believed required attention during this accelerated implementation phase. These included:

- Beefing up the capacity of the state to deliver;
- Strengthening public management;
- Fostering and nurturing public service leadership;
- Accelerating service delivery; and
- Achieving social development and addressing poverty through mechanisms that promote greater public participation.¹⁵

During this period, the Public Service Act was amended in 2007¹⁶ and the draft Public Administration Management Bill – the precursor to the debate about the single public service – was tabled.

According to its explanatory memorandum, the over-arching objective of the Public Service Amendment Act (No 30 of 2007) was to improve the organisational human resources framework of the public service which would, in turn, improve service delivery. To this end the amendments sought to:

- Improve staff mobility arrangements for the public service;
- Facilitate closer alignment between the conditions of service of the general public service falling under the existing Act and sectors which, although part of the public service, have their own employment legislation;
- Introduce government components as a new institutional form in the public service and specialised service delivery units in departments, to facilitate direct service delivery through a focused, ring-fenced separate entity under the direct control of a minister or executive authority (the political head);
- Enhance compliance with the current Act through compulsory disciplining of transgressors and reporting on this;
- Address a number of legal difficulties arising from the day-to-day application of the existing Act, as well as arbitrations and court cases; and
- Simplify the current Act by streamlining several provisions, removing obsolete provisions and aligning the current Act with other legislation to facilitate its administration, in turn enhancing service delivery.

The streamlining of management envisaged in the 2007 amendments and the deep structural changes envisaged in the public service Bill constitute some of the most significant new challenges the public service must confront. Some of these changes will be minor matters of enhanced implementation, but others will again entail more significant overall restructuring – perhaps the most significant since the amalgamation of 11 disparate administrations in the early 1990s.

New challenges, new changes

A new challenge that has emerged, following the changes made to the structure of government when President Jacob Zuma announced his new Cabinet in May 2009, has been the creation of two new ministries in the presidency, for national planning and monitoring and evaluation. This will have a clear impact on the role and responsibilities of the public service.

The PSC, which also has responsibility for monitoring and evaluation under sections 195 and 196 of the Constitution, pointed out to Parliament's Portfolio Committee on Public Service and Administration¹⁷ that possible duplications must be avoided and that there is an opportunity to improve the monitoring and evaluation of government

by building close links between the new monitoring and evaluation unit and ministry in the Presidency, on the one hand, and the PSC, on the other.

In addition, the long-simmering question of the “macro-structure of government”, which concerns the current three-tiered structure of government and possible long-term changes that may entail contestable amendments to the Constitution, will have to be resolved, as many subsequent restructuring questions, such as the creation of a single public service, are contingent on these shifts.

Indeed, the new governance and administration cluster that has been created brings together the Minister for Public Service and Administration and the Minister of Cooperative Governance and Traditional Affairs as the coordinating ministers. The broader Cabinet committee includes the ministers in the Presidency and the Ministry of Home Affairs; Finance; Justice and Constitutional Development; and Women, Children and People with Disabilities.

What is abundantly clear is that recruitment, training and retention of skills will be required, as well as the appropriate value-based orientations to public service rather than private interest, and the effective leadership of the public service. What is also incontestable that the revamping and construction of a civil service along these lines will not be cheap, and may entail an expansion of the public sector. This would be a distinct departure from the targets for reduced civil service numbers envisaged when the Growth, Employment and Redistribution (GEAR) macro-economic policy was in force.

Indeed, the Fifteen Year Review points out that the creation of a single public service with high standards of recruitment and promotion and a focus on improving performance in key areas will be a critical priority in a new strategy. The review makes it clear that any improvements in state capacity will require attention to skills standards, systems and institutions, not just more resources – even though resources will be a factor if vacancy rates, however disputable the figures may be, are to be addressed.

Three core challenges

The single biggest challenge confronting the public service is to prioritise service delivery and bring about real change for all South Africans – but particularly for the most vulnerable who are trapped in social exclusion. Three challenges will play a decisive role in determining the ability of the service to honour its constitutional mandate: the contentious question of creating a single public service, which, depending on the final form of the legislation introduced in Parliament will almost certainly face a legal challenge; building an ethical culture at the core of the public service in the face of clear indications of significant corruption and conflicts of interest; and the interrelated questions of skills, vacancies and redress amid such societal problems as HIV/Aids, which has contributed to the loss of skilled staff and vacancies. These challenges are discussed in greater detail below.

More restructuring: a single public service

Though it promises to be highly contentious, the government's prescription for what needs to be done to improve public service delivery is greater centralisation under more consistent national norms and standards in key areas of human resource management.

The assumption seems to be that the institutions across government's three spheres that comprise the machinery of the state must work together more effectively to fulfil the needs of citizens, and that it is vital to align structures and systems across all three spheres in human resource management and development, service delivery, information and communications technology, and anti-corruption efforts and framework legislation. As Zuma has told Parliament:

The state is constitutionally bound to ensure that services of a high quality are delivered to citizens at their convenience. This means that government must find the most effective methods and channels to deliver services. It calls for a dynamic, modern delivery model and systems that cluster these services, to the convenience of the citizen, through a 'single window' – a place where a person can receive a range of government services, be this a physical structure or by electronic access.¹⁸

To give an example of how this "single window" approach is meant to work, the public service department has announced that it intends to develop a prototype of six pro-poor services: registrations of births, notifications of death, and applications for identity documents, foster care grants, pensions and maintenance.

A single public service has been on the government's agenda since 2002 when a comparative study was conducted to identify impediments to the transfer of staff and their functions across the three spheres of government. Since then, considerable work has been done on the details, specifically in regard to local government – the most contentious constitutional aspect of proposals for a single public service. In 2006 the Cabinet approved a "Strategy Towards the Development of Overarching Legislation for the Single Public Service", while the Public Administration Management Bill [B47-2008] was published in the Government Gazette for public comment on the 2 June 2008, only to be withdrawn before the 2009 elections, ostensibly because of constraints in Parliament's legislative programme.

Among the objectives of a single public service set out in the Cabinet strategy paper were the following:

- Deepening integrated service delivery by creating service delivery points from which the citizen can access public services. Multiple institutions will collaborate in creating a "single window" of access;
- Strategically aligning the institutions that comprise the machinery of the developmental state to complement one another, so that they operate effectively and fulfil the needs of South Africans;

- Creating common norms and standards for human resource management and development and conditions of service across the three spheres. This will make it possible to transfer expertise across the three spheres to any government department or municipality.

A single public service is thus envisaged as functioning as an integrated whole through consistent norms and standards set by appropriate legislative and regulatory frameworks. Such norms will deal with wage policies across all spheres of government; harmonised conditions of service (including medical aid and pensions – there are significant differences between defined benefit and defined contribution pension funds at provincial and national government level on the one hand, and municipal government on the other); norms and standards for human resource management and development; legal mechanisms for mobility; and a common culture of service delivery.

The explanatory memorandum of the draft Public Administration Management Bill emphasises that the legislation aims to accelerate the integration of government services, systems and personnel to assist in the core challenges of service delivery. It comments:

This is a massive task, requiring extensive change throughout public administration and encompassing a change in mindset as much as legislative and institutional change. A people-centred administration is envisaged that permits, or may require, public service employees from different branches of the administration to work together to find creative solutions to the service delivery challenges facing the country.¹⁹

The central goal, therefore, is to create a coordinated public administration in the national, provincial and local spheres of government. However, there are major constitutional questions with respect to local government, and in regard to whether such conditions of service can be regulated in this way in the municipal sphere through amendments that will affect core constitutional tenets and create new powers for the national Minister of Public Service Administration and the PSC in an expanded role. The constitutional debate on the single public service also has implications for the steps government should take to guarantee the realisation of socio-economic rights enshrined in the Constitution through accelerated service delivery. Such factors will set the constitutional terrain on which the debate on a single public service will play out. They will also be shaped by the broader backdrop of debates about the future of the provinces and the macro-structure of government.

In the context of the centralisation and decentralisation debate that has marked the entire transition of the public service, and against the backdrop of NPM, the explanatory memorandum argues that the legislation does not seek to centralise but will, rather, strengthen decentralisation:

The decentralised approach adopted in 1996 and implemented in stages culminating in the promulgation of the Regulations in 1999 remains the approach for the Bill. The Minister is enabled to create a framework of generally applicable norms and standards within which government institutions in the national, provincial and local spheres may determine their own policies and practices. At the same time, however, efforts will be made to harmonise systems, structures and conditions of service in order to reduce unjustifiable disparities, duplication and lack of interoperability between institutions, and to promote integration and coordination for improved service delivery.²⁰

At the first tabling of the draft single public service bill the official opposition, the DA, argued that the legislation would strip away municipal autonomy, as provisions allowed the national government to transfer and deploy staff without the consent of the local authority concerned.

The Cabinet strategy paper rejects this, saying that “rather than undermine the distinctiveness of local government as a sphere, the single public service will improve the manner in which the spheres inter-relate and co-operate with each other to ensure enhanced delivery of services”.

In his state of the nation address on 3 June 2009 Zuma reiterated that the creation of a single public service would be a priority for his administration. The response of DA leader Helen Zille made it clear that a significant political battle, based on constitutional principles, will mark the legislative process:

[Zuma’s] promise to ‘speed up the establishment of a single public service’ is worrying. The creation of a single public service is likely to reduce the provincial and local spheres of government to mere administrative arms of central government, which would be unconstitutional. A single public service will enable the ANC to use a centralised bureaucracy, accountable at national level, to impose its policies countrywide, even where the ANC loses elections. This will undermine one of the cornerstones of our democracy, which is that citizens should be able to choose the policies they think are best and change their government by using their vote. It will remove vital checks and balances on power abuse. It will disempower local and provincial government as agents of service delivery, and it will make public servants at local government level accountable to a centralised bureaucracy than the residents of the municipalities they serve.²¹

The DA has repeatedly called on the government to release the results of a cost-benefit analysis of a single public service, conducted by former public service minister Geraldine Fraser-Moleketi as part of renewed debates on the draft Public Service Management Bill in the legislative programme of the new administration, or as part of any public consultation process pursuant to the introduction of new legislation drawing on an earlier version of the draft Bill.²²

What seems clear is that whatever new legislative steps are taken in the months ahead – including the resubmission of a slightly amended version of the Public Administration Management Bill – a lengthy implementation delay can be expected. It will undoubtedly be the subject of litigation by the DA given that party's control over provincial and municipal administrations in the Western Cape, where it may wish to retain more flexible human resource regimes already in force as part of its efforts to create an alternative governance model.

Ethical challenges: private versus public interests

In a report to Parliament,²³ the Auditor-General drew attention to the extent to which government employees – in clear conflicts of interest and in conflict with essential meaning of “public interest” itself – are doing business with national departments. A transversal performance audit conducted between August 2007 and July 2008 on government employee-related entities doing business with national and provincial government emphasised the following issues:

- The performance of (outside) remunerative work by public servants;
- The failure to declare registrable interests;
- The failure to declare interests in standard bidding documentation;
- Deviation from the supply-chain management process and cases where conflicts of interest existed;
- Non-compliance with certain Treasury regulations; and
- Non-compliance with VAT legislation.

The Auditor-General's report has opened a Pandora's box, revealing a public service riddled with self-interest to the detriment of the public interest.

Among other things, the report identified 49 public servants who were directors or members of companies or close corporations (CCs) that did business with national departments, 46 of whom did not have the requisite approval to perform outside remunerative work. The amount paid to these companies and CCs in the period under review was about R35,7-million. Secondly, the report found that employees who are directors or members of companies or CCs that did business with national departments – amounting to R30, 6-million in the period under review – had failed to declare their interests on the financial disclosure form that the PSC requires them to submit. Thirdly, it found that tenderers have misled government by not declaring in their tender documents that employees are related to the companies and CCs that are tendering for state contracts. The report also said that supply-chain managers in national departments did not adhere to supply-chain management procedures and regulations in awarding contracts to employee-related entities. A similar picture emerged during a transversal audit of the same issues at provincial level.

What emerged even more clearly from the Auditor General's report was the stark absence of adequate rules governing conflicts of interest, a matter that has concerned the PSC for some time, and a very weak system of implementation where rules require

that permission is sought for outside remunerative work and interests are disclosed. Worse still, the report finds that very little action is taken when contraventions are detected. The director-general of the public service department admitted to Parliament that disciplinary steps or prosecutions could not take place when members of the public service simply resigned after their transgressions were uncovered.

Given that a total of almost R600-million was involved and that more than 2 000 officials were found to be directors of companies or CCs doing business with the state, it seems clear that the government needs to address a culture of endemic corruption very aggressively. The report shows that public service accounting officers have much to do in terms of their responsibilities under the Public Finance Management Act to ensure proper internal controls are installed and implemented in their departments. However, this is further complicated by the involvement, in certain cases, of accounting officers themselves in conflicts of interest and other contraventions.

Such questions spilled over in a heated Scopa hearing on the Auditor General's report on 8 July 2009. Despite the public service department's efforts to show that they had a legal opinion from 2003 on what was to be regarded as remunerative work, the committee took the department to task for failing in their mandate by not seeking to resolve these matters much earlier. During the hearing it became abundantly clear that the existing departmental framework for ensuring financial disclosure is wholly inadequate and will require redrafting. Indeed, the situation is so dire that the director-general of the PSC told Scopa that it is worsening and that steps need to be taken.

While the department welcomed the Auditor-General's report, it simply alluded to policy developments relating to the declaration of interests and conflicts of interest still to be developed. One can only hope that Zuma will honour the commitment he made during parliamentary question time on 26 August 2009 to expedite the new framework, and that the executive and legislative branches of government will take all necessary steps to reverse the decay of values in the public service that the report highlights.

It must be said, however, that credit is due to the PSC for repeatedly raising the alarm on many of these questions in its State of the Public Service Reports and in a specific study of conflicts of interest that made recommendations about developing policy in this area.

In previous reports, the PSC has raised the alarm about non-compliance with the Framework for Financial Disclosures. In these, it recommended that specific penalties should be considered for non-compliance and that the framework could be more explicitly linked to the performance agreements of managers.²⁴ This takes on additional importance in the light of the eighth State of the Public Service Report, in 2009, which raised explicit concerns about non-compliance by staff in the departments of transport and public works. These departments are most closely associated with public expenditure linked to South Africa's hosting of the Fifa World Cup.²⁵

The PSC has also consistently emphasised the need to deal decisively with conflicts of interests and dual employment in the public service, producing a specific report

on the matter, “Report on the Managing of Conflicts of Interest in the Public Service”, in 2006. It called for a comprehensive policy framework on the management of conflicts of interest to be developed, with clear timelines for communication with Parliament to facilitate the necessary legislative oversight of this project in 2008. Zuma’s statement during question time in August 2009 that the Minister of Public Service will be requested to expeditiously table such a framework in Cabinet is welcome, as the framework is overdue. It is regrettable that considerable public funds have already been spent on preparations for the World Cup without such a system being in place to curb abuses.

In a recent report on the implementation of the financial disclosure framework,²⁶ the PSC draws attention to the fact that compliance by the Senior Management Service (SMS) with the financial management framework has been lax since its introduction in 1999/2000. The commission points out that the continued lack of commitment to the instrument is shown by persistent non-compliance with its requirements. The mandatory cut-off date for submission of disclosure forms is 31 May each year. For the 2007/8 financial year only 48% of disclosure forms were received by the due date. Some director-generals failed to make these disclosures, while some public servants are repeat offenders who have not been sanctioned for non-compliance. In its report the recommends that:

- Executive authorities must prioritise this issue;
- Non-compliant SMS members must be charged with misconduct;
- Repeat offenders should be charged with misconduct and executive authorities must obtain outstanding forms from repeat offenders and submit them without delay;
- Departments must appoint dedicated staff to manage the completion of financial disclosure forms by senior managers;
- Executive authorities must make SMS members aware that they must disclose private companies and close corporations, including dormant and non-profit-making entities. SMS members must take personal responsibility for keeping the Companies and Intellectual Property Registration Office (Cipro) updated with respect to resignations;
- Departments must put in place mechanisms for the management of conflicts of interest as required by the Public Finance Management Act, Treasury regulations and risk management prescripts;
- There must be regular interaction with parliamentary portfolio committees, which must ensure that departments and executive authorities account in cases of non-compliance or low levels of compliance.

The ethical question is rapidly emerging as the key challenge confronting the public service. In its Sixth Report on Financial Misconduct, the PSC drew attention to the types of financial misconduct that have been reported, including fraud and theft, and its high incidence among senior managers. It recommended that:

- Financial misconduct should be clearly defined, as the definitions in Public Finance Management Act and Treasury regulations are inadequate;
- The investigative capacity of departments should be increased;

- Fraud prevention plans and risk assessments should be strengthened;
- Departments should ensure that debts are recovered;
- Reporting on recovery of debts should be improved.

While such steps will certainly assist the ethics revolution required in the public service, all role-players will have to play their part in the mammoth task of ensuring a more principled, people-centred civil service in the interests of South Africa's democracy and the democratic state.

Parliament has a crucial role to play, and the recent restructuring of parliamentary committees as well as the National Assembly's new budgetary powers and enhanced relationship with the office of the Auditor-General bode well in this regard. Parliament's institutional rules and a political climate where all members are collectively responsible for oversight, irrespective of their party affiliations, are crucial. It is a welcome development that the Auditor-General's office is seeking a closer and more cooperative oversight arrangement with the National Assembly in a move to assist all committees, meaning that not only Scopa will be involved in any oversight revolution.

A non-partisan debate the National Assembly held in 2009 on the Auditor-General's report also sent an important signal to public servants that Parliament will take a united stand in renewed levels of oversight over their outside interests.²⁷

Furthermore, with the contraction of the world economy and South Africa in recession, government revenues have dwindled. Given efforts to economise across all spheres of government and enhance value for money in public spending, the public service must become more professional and minimise irregular, fruitless and wasteful expenditure, as defined by the Public Finance Management Act. In this regard, vacancies in accounting and financial management functions across the public sector become crucial. Its 2008 status report noted²⁸ that expenditure in these categories has been rising, resulting in ineffective and inefficient spending and a waste of resources.

The commission points out these categories of expenditure by national departments amounted to R142,1-million in 2003/4, falling to R83,8 million in 2004/5 and more than doubling to R266,7-million in 2005/6.

This poses legislative and oversight challenges. A review of the Public Finance Management Act is overdue, while Scopa will have to be much more rigorous in interrogating these categories of spending when the relevant departments appear before the National Assembly. Public servants need to know that Scopa will take a special interest in these matters.

In its 2008 status report, the PSC notes 582 cases of financial misconduct in the 2003/4 financial year, a figure that fell to 513 in 2004/5, only to increase to 771 in 2005/6 and to 1 042 in 2006/7. Clearly action is required, as the PSC found there had been little accountability in these cases, saying that "what is even more worrying is that in most of the cases, departments could not provide any indication of whether they have been able to institute criminal proceedings against offending employees, which means that chances of recouping some of the money involved are limited."²⁹

The PSC's 2009 status report echoes and amplifies the concerns about relative inaction and slow action in cases of financial misconduct, slating departments for taking as long as eight months to finalise misconduct cases.³⁰ Criticism was also levelled at lenient sanctions and inconsistent treatment in cases of financial misconduct:

*The inconsistencies in sanctions send a message that the public service does not really know how to deal with cases of misconduct. This is a message which the public service can ill afford because it can also compromise efforts to deter unethical behaviour in the use of resources earmarked for the hosting of the World Cup.*³¹

It seems clear that trends in financial misconduct and the slow rate of compliance on financial disclosures – an overall submission rate of 80% for 2007/8, lower than the rate for 2006/7 – give cause for great concern, exacerbated by the recent findings of the Auditor-General on business entities connected with government employees and the conducting of business with national departments.

Indeed, the PSC examined disclosures for the 1999/2000-2004/5 financial years and found that the proportion of SMS members involved in companies, or who had directorships and partnerships that could result in potential conflicts of interest, ranged from 45%-72%.³² Similar challenges arise with respect to supply-chain management.

It is, therefore, not surprising that the PSC has consistently called for a more integrated approach to these questions, not only aligning policies and filling legislative gaps but also creating a more holistic National Integrity System. A resolution of the Third National Anti-Corruption Summit called for a task team to consolidate and articulate such a system. However, this will have limited effect as long as a true values-based ethos in the public service continues to elude South Africa. This has to be established at the highest levels of government and inculcated in every public servant.

Of equal significance in the overall accountability of the public service is the fact that too many departments still receive qualified audit opinions – especially departments that are repeat offenders. It is perhaps even more worrying that PSC notes that in the period 2004/5-2007/8 there has not been a single year in which all heads of departments have entered into performance agreements, as they are required to do. In the 2007/8 financial year, compliance with the requirement of national and provincial departments that such agreements be submitted stood at 70%. This improved marginally to 73% in 2008/9, but the lack of full compliance remains alarming.

The PSC's Fifth Consolidated Monitoring and Evaluation Report indicated that accountability performance in the public service still required significant improvements. It said that "the public service's accountability levels still need to improve in relation to four standards, namely, internal financial controls, performance management systems, risk management, fraud prevention and investigative fraud".³³

The Western Cape's DA-led coalition government has adopted a set of reforms³⁴ to better regulate the conduct of public servants, which Premier Helen Zille has also

recommended to the Minister of Public Service and Administration as measures that could be reflected in national legislation. These measures aim to:

- Stop public servants who face disciplinary action from being re-employed (“transferred”) elsewhere in the public service, thereby avoiding disciplinary action;
- Stop certain categories of public officials from carrying out private remunerative work, especially where there is any potential for a conflict of interest;
- Ensure that public servants are not entitled to receive gifts from outside parties as part of their official duties in any circumstances;
- Stop tender abuse, with the proper enforcement of a list of defaulters;
- Restructure provisions for car allowances to stop public servants with poor credit records from being able to use the Treasury as a personal bank to obtain car loans;
- Stop the abuse of special leave for sporting events. Currently there is no limit on special leave for a wide range of sporting events, an arrangement open to abuse;
- Prevent any public servant from being able to work as a councillor at the same time. (This would require the amendment of existing legislation on political participation); and
- Stop automatic payouts to public servants on resignation.

What emerges most strongly from the various ethical challenges that confront the public service is a real sense that South Africa has lost the meaning of what the public service should be in a deeply unequal country marred by persistent poverty and marginalisation. It was never meant to be about self-interest; that it is becoming so does a disservice to the sacrifice of leaders such as former president Nelson Mandela and exposes millions of South Africans to further marginalisation and social exclusion.

Speaking on the Medium Term Budget Policy Statement, Finance Minister Pravin Gordhan put it succinctly:

We are fighting a new struggle now. As Comrade Chris Hani once said, there is ‘another struggle to make freedom and democracy worthwhile to ordinary South Africans ... We must build a different culture in this country and that culture should be one of service to people’. We are particularly concerned about the number of government tenders, in all three spheres of government, that are tainted by corruption. Corrupt officials stand on one side, while on the other side stand corrupt business people. A culture of gifts, wining and dining, and all manner of enticement has become pervasive. We must act decisively against such a tendency, and we must do so together. Honourable Speaker, we are called upon to make a special effort to protect the values on which our democracy is founded. Only then will we experience real freedom in our country, for all people.

But building a modern service-orientated public service is not just about ethics; it is also crucially about the skills required to staff such a service. The public service is a microcosm of a broader society-wide challenge, but it has equally profound

consequences given that it is the government's vehicle for delivering meaningful change to people's lives.

Skills dilemmas: vacancies and training efforts

The post-1994 history of the public service is one of rightsizing, on the one hand, and worrying vacancies in key management echelons, on the other. Even more worrying is the fact that there are no reliable figures on the vacancies that plague the public service. This is due to discrepancies in figures recorded by Persal, the computerised human resources system used by the public service, which reflects 55 000 vacancies, and the 30 000 vacancies reported by government departments. In a presentation³⁵ to Scopa, the Department of Public Service and Administration pointed out that departments often restructure internally and create new posts without abolishing posts that will no longer be filled. These then remain dormant, existing only on the Persal system. Most departments rely on systems other than Persal for management information, creating uncertainty that hampers effective management and has budgetary implications once a clear audit produces accurate statistics on vacancies that require filling.

As a study by the Centre for Development and Enterprise ³⁶ pointed out:

At the end of December 2006 national and provincial governments alone listed some 321 665 vacant posts, with average annual vacancy rates holding steady at 24.28% (2006), 23.38% (2005), and 25.12% (2004). The highest vacancy rates occur within the senior management band, with an average of 35% of all posts unfilled; a 59% vacancy rate at deputy director-general level is particularly disturbing as is the vacancy rate in middle management. Six out of every ten deputy director-general positions remain vacant.

In addition, high turnover rates and levels of dissatisfaction in the public service have led the government to conduct a personnel expenditure review to probe flexibility arrangements in remuneration, given that the supply of skills in certain occupations is particularly limited. The review developed the concept of the occupation-specific dispensation (OSD), a remuneration structure, grading, career pathing and pay progression that would be specific to a profession. Professions that embrace the OSD initially included the medical and legal professions, educators and engineers and veterinarians. The implementation of the OSD in regard to health professionals posed significant challenges to government in 2009 despite the fact that it has been implemented for all categories of nurses, legally qualified professionals, educators and social workers.

With respect to skills training, the old South African Management Development Institute has been converted into the Public Administration Leadership and Management Academy (Palama) and steps have been taken to engage in massive skills training

efforts in the public service that also involve the Public Sector Training Authority. Beyond the vexed question of reliable vacancy figures lies a significant additional layer of human resource challenges related to adequate training and skilling of public servants and the need for massive efforts in this area.

At the Cabinet lekgotla in January 2008 the newly established Palama was given two key strategic tasks: designing and delivering an integrated curriculum for executive development and junior managers, and crafting a strategy for a massified training by the academy.

The restructuring of Palama is just over a year old, and the training and skilling demands across the public service are significant. As Chelechele³⁷ (2009) points out:

It is quite evident that prior to 1994, the majority of the South African population did not have much of a choice in how they would access skills training or what type of skills training they would like to pursue. The market was constricted in terms of the types of skills it could offer and who should benefit from that skills training. This is why South Africa is now experiencing the skills shortage in the public service.

It is clear that the twin imperatives of transformation and pursuing aspects of New Public Management have created significant demand in the public service for skilled managers and junior managers, and that this has imposed significant skills development pressures. In addition, the impact of HIV/Aids on the public service, as on other sectors of the economy, will heighten the pressure to fill vacancies and provide skills development in a sustainable manner, meaning that adequate human resource plans should be in place.

Conclusion

The three key challenges confronting the public service highlighted in this chapter are contingent on the resolution of a number of other structural matters.

The first of these is the relationship between new structures in the Presidency and the lines of accountability generated by the Constitution that have to be created for public service-wide monitoring and evaluation. The PSC has told Parliament³⁸ that it believes that the creation of a Ministry for Monitoring and Evaluation brings with it important opportunities for raising the bar in monitoring and evaluation and strengthening accountability for performance. It will, however, be important to ensure that there is no overlap between the work of the monitoring and evaluation unit and the PSC. It is possible that as the new unit takes off, it may have to collaborate with the PSC, including asking for assistance in some of its monitoring and evaluation functions.

The public service can only be people-centred and people-driven if the deep-seated skills issues and ethical and values questions alluded to in this chapter are decisively addressed. This must happen with due regard to the budgetary consequences.

Equally, the public service can only deliver such an orientation if the strategic macro-questions about the role of the constitutionally-created PSC and the new Ministry for National Planning and Ministry for Monitoring and Evaluation in the Presidency are answered clearly, and the core mission of building an effective civil service is not ensnared in higher-level institutional dynamics.

What must not be lost sight of is that a robust public service is the thin line between service delivery and societal anarchy and anger. The rampant protests engulfing a promising young democracy trying to bring real change to citizens trapped in systematic social exclusion and poverty, which marred its past, cannot be allowed to be the hallmark of its future.

Parliament and the Ministry of Public Service and Administration should consider staging extensive public hearings each year, in the same way that the PSC tables annual State of the Public Service reports in Parliament. In addition, as the new relationship between the PSC and the planning and monitoring and evaluation ministries in the Presidency gives birth to new systems that affect the public service, it is recommended that these developments should be reported to Parliament at quarterly intervals to facilitate a broader public discourse about the progress towards a clean, efficient and service-orientated public service. Parliament should develop specific mechanisms to ensure that the ministry and other government departments implement the recommendations made regularly by the PSC.

In addition, it is imperative that the Public Finance Management Act and Treasury regulations are refined and adjusted to assist in the fight against corruption, which threatens the delivery vehicle the state requires to ensure social stability.

At the time of writing, the Cabinet had just announced the creation of an Anti-Corruption Inter-Ministerial Task Team to deal with public service corruption. The team's brief will be to ensure that action is taken against corrupt officials, based on the PSC's reports and recommendations. This new initiative follows a string of similar anti-corruption moves in the past. What is different about it, however, is the inter-ministerial nature of the task team and the level of priority it appears to enjoy – past anti-corruption efforts were confined to the Department of Public Service and Administration. The Anti-Corruption Inter-Ministerial Committee is chaired by the Minister of Monitoring and Evaluation, Collins Chabane, and includes the Ministries of Public Service and Administration, Finance, Cooperative Governance and Traditional Affairs, and Social Development, while representatives from the justice, crime prevention and security cluster will also take part.

The key requirements for success remain the political will to act against corruption and the example set by senior government and private sector leaders. The signals sent by the leaders of society have an important role to play in transforming the permissive institutional culture of the public service in regard to corruption. The efforts of the state and new anti-corruption bodies or institutional rule changes, important as they are for the prosecution of those who transgress against the poor, vulnerable and marginalised by stealing their resources, must be accompanied by a change of heart.

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KEY INSTITUTIONS AFFECTING DEMOCRACY IN SOUTH AFRICA

PIERRE DE VOS

Introduction

What role do the institutions created by the South African Constitution play in defending the wellbeing of our democracy? Are the institutions of governance more important than the country's economic performance, its people, its organs of civil society and its political leaders in ensuring mature governance? Can the institutions created by the 1996 Constitution really "save" us from the abuse of power? And, if so, are these institutions performing their tasks successfully? In this chapter I will attempt to address these questions, focusing specifically on Parliament, the judiciary, the National Prosecuting Authority (NPA) and the Chapter Nine institutions charged by the Constitution with safeguarding democracy.

The institutions created by the South African Constitution *do* matter to democracy.¹ In fact, their effective and smooth functioning is of fundamental importance for the health of our democracy. There are at least four reasons for this. Firstly, the 1996 Constitution represented a historic compromise between the former oppressors and the oppressed, enabling both sides to attain their basic goals while remaining true to their principles.² The Constitution envisaged the creation of credible institutions to ensure that the compromises reached during those negotiations were implemented and agreements were safeguarded. These institutions should not be seen as stumbling blocks in the way of the social, political and economic transformation of South Africa. They were also created to enhance the legitimacy of the state and its ability to deliver on its transformation mandate.

This is because, in the second place, it was envisaged that these institutions would play a pivotal role in transforming our society and political culture into a more egalitarian and just order, within the Constitution's disciplining framework. In 1994, South Africa emerged from a racially divided and oppressive past, during which an illegitimate government failed to honour even the most basic tenets of the rule of law. The new democratically elected government inherited a state that was "farcically

bureaucratic, secretive and unresponsive to the basic needs of the majority of its citizens”.³ Most state institutions had little or no credibility and were profoundly distrusted by the majority of the people.

For some constitutional negotiators it was, therefore, clear that the transformation of South African society from an intensely oppressive society into an open and democratic society based on human dignity, equality and freedom would require more than a change in the system of government. It would also require the transformation of existing institutions – including Parliament, the judiciary and the prosecuting authority. It would also be necessary to create new institutions – the Constitutional Court and Chapter Nine bodies – to safeguard democracy in the long term and promote human rights.

There is, however, a third significant reason why it is necessary to focus on these institutions and why the health of our democracy depends, at least to some extent, on their effective functioning. The post-1994 era has been characterised by a one-party political landscape,⁴ which brings enormous pressures to bear on the integrity of our system of government, the rule of law and, ultimately, democracy. This is not because of particularly malevolent tendencies in the governing party, but because one-party dominance – especially in a system with relatively weak checks and balances between the legislature and the executive and a dominant executive – often leads to a concentration of executive power. Unchecked by independent institutions, those holding it would be tempted to manipulate or abuse it to gain financial or political advantage and entrench their rule, and this can impoverish democracy.

Lastly, the literature of political science suggests that severe inequities of income, assets and opportunities in society can play a large role in determining whether a democracy thrives or falters.⁵ South Africa is marked by severe inequities that, even more alarmingly, are largely based on race. It may well be impossible to eradicate them in a relatively short period, and if the literature is to be believed, this poses a threat to the long-term survival of democracy in South Africa. In the short to medium term, therefore, independent constitutional institutions are needed as part of a system of checks and balances to safeguard against the concentration of power and help make the system fairer, more transparent and more accountable. Although the creation of independent institutions alone will not safeguard democracy, such institutions can form part of the constitutional architecture established to build the democratic order. These institutions need to work well if democracy is to thrive, but this does not mean that other factors will not play a role in determining the fate of a democracy.⁶

To what extent have the relevant institutions been successfully transformed and do they fulfil their role in South Africa’s democracy? The four institutions I focus on – Parliament, the judiciary, the NPA and Chapter Nine institutions – were envisaged by the Constitution as playing a crucial role in deepening democracy and safeguarding the historic compromise reached by constitutional negotiators. I chose these institutions not only because each of them has an important role to play in the effective functioning of our democracy, but also because each has been mired in controversy in recent years and, for various reasons, each has been criticised for not fulfilling its

functions as envisaged by the Constitution. The “Travelgate” scandal, for example, dented the credibility and image of individual members of Parliament and of the institution itself, while Parliament has also been criticised for faltering in its oversight and accountability role. The attempted prosecution of President Jacob Zuma and the firing of the National Director of Public Prosecutions have strained relations between the governing party, on the one hand, and the judiciary and the NPA on the other, calling into question the credibility of these institutions and the criminal justice system as a whole. Allegations and counter-allegations levelled between Western Cape Judge President John Hlophe and the judges of the Constitutional Court have also placed a severe strain on the judiciary. Finally, several Chapter Nine bodies have been in the news because of infighting, allegations that they are dysfunctional and adverse court findings against them.

These controversies and tensions must be seen against the background of normal anxieties about the health and wellbeing of democracy during a transition from authoritarian to democratic rule. It is, therefore, appropriate to analyse the challenges faced by these institutions, as this relates directly to questions about the strength of South Africa’s democracy.

Parliament

Fifteen years into the democratic era, Parliament has not always served as the engine room of our democracy and has not always provided a platform for representative and participatory democracy to flourish. Parliament suffered public relations problems – to put it mildly – relating to the Travelgate scandal after a number of MPs pleaded guilty to defrauding Parliament by abusing their travel vouchers. Allegations of corruption have also been levelled against several parliamentary officials, further tarnishing the institution’s image.

Although it may be unfair to judge Parliament’s effectiveness on the basis of such events, they have eroded trust in the institution. An evaluation of Parliament’s role must look beyond these superficial problems, focusing, rather, on its overlapping mandate of passing legislation and holding the executive and other organs of state to account by diligently exercising oversight over them. Unfortunately, Parliament has not come close to fulfilling its dual functions in the manner envisaged by the Constitution. On the kindest reading, this has meant that it has not contributed adequately to the deepening of democracy; at worst, that it has weakened democracy by its acts and omissions.

The reasons for this are complex. They relate, firstly, to weaknesses in the architecture of the South African Constitution, and secondly to broader issues relating to the political culture and landscape in South Africa. They also relate to the personal attributes of MPs and sometimes unwise or unprincipled political party leadership.

To gain a better understanding of Parliament’s less than stellar performance, we must define its structure and role, as prescribed by the Constitution and interpreted

by the Constitutional Court. We must also focus on other weaknesses relating more broadly to South Africa's political culture.

The 1996 Constitution⁷ establishes a system of democratic government based on the supremacy of the Constitution, the rule of law and the separation of the three branches of government – the legislature, the executive and the judiciary – with checks and balances to limit the possibilities of the abuse of power by any of the three branches. The constitutional order is, therefore, avowedly a *democratic* order and Parliament is envisaged as being at its heart.

South Africa has a bicameral Parliament, consisting of the National Assembly and the National Council of Provinces (NCOP).⁸ Traditionally, the members of the two houses are elected in different ways to give effect to the notion that each represents different interests and may act as a check on the other.⁹ The National Assembly is the more important house with wider powers, and is intended to represent the interests of all South Africans to ensure government by the people under the Constitution. The NCOP is intended to represent the interests of the nine provinces, to ensure that provincial interests are taken into account in the national sphere of government.¹⁰

At a structural level the weakness of Parliament vis-à-vis the executive can be related to the electoral system through which representatives are elected. The members of the National Assembly, currently 400 in number, are not directly elected in the first-past-the-post system used in many Commonwealth countries, including the United Kingdom and India, or the United States. Instead, voters cast a ballot for the party of their choice, and according to a list system, each party is allocated a number of seats directly proportional to the percentage of the votes it wins. Parties are required to submit a list of candidates in the order of preference before each election, and representatives are taken from these lists to serve in the National Assembly.¹¹ If a member of the National Assembly ceases to be a member of the party that nominated him or her, that member loses his or her seat.¹² Since the scrapping of the "floor crossing" provision, this holds for the life of Parliament; no member of the National Assembly can legally cross the floor to another party and retain his or her seat.

The NCOP is a much smaller body of 90 members – comprising ten-member delegations from each of the nine provinces – and its members are not directly elected by the voters. Instead, they are appointed by the provincial legislatures according to a formula that allows, broadly speaking, for the proportional representation of political parties represented in the provincial legislature in each of the delegations.¹³ Six delegates of each province are appointed as permanent delegates and are based permanently in Parliament. There are also four special delegates, consisting of the Premier of the province or "if the Premier is not available" any other member of the provincial legislature designated by the Premier, and three other special delegates who may change from time to time or even for a single sitting of the NCOP.¹⁴ While the six permanent delegates are supposed to "anchor" the provincial delegation and provide continuity, the four special delegates are supposed to provide a close link between the provincial legislature and national Parliament, as well as providing specialised expertise that may be required by the law-makers.

Although it has not entirely escaped criticism in this area, Parliament has been most effective in its law-making mandate. Much of the criticism can be traced to the dominance of the executive branch of government which, as we shall see later, is to some degree institutionalised through the electoral system, the prevalent culture among political parties and the dominance of one party in both the legislature and the executive. Although the Constitution vests the legislative authority in Parliament,¹⁵ in what almost seems a contradiction, almost all legislation is initiated by the executive before being considered by the relevant parliamentary committees. Although the National Assembly and the NCOP are empowered to initiate legislation, the dominance of the executive – controlled by the ANC, the overwhelming majority party in the legislature – means that this power is almost never used.¹⁶

The committee system is the engine room of Parliament and it is at the committee stage that Members of Parliament may exert a decisive influence on the content of legislation. Parliamentary committees often change aspects of legislation after the necessary deliberation and receiving input from civil society, including NGOs and members of the public. Although the situation varies from one portfolio committee to the next, often depending on the quality of the members and the strength of the leadership provided by the committee chair, the way that portfolio committees have dealt with legislation can be described as one of Parliament's success stories. Despite the fact that legislation is introduced by the dominant executive after approval by the Cabinet – which includes many leaders of the majority party – portfolio committees vigorously interrogate draft legislation and sometimes even change it, especially when it is not politically charged. The public involvement of civil society is pivotal in this process.

Parliament has been most effective in fulfilling its legislative mandate, passing a large number of Acts, many of them dealing with complex issues and representing significant policy initiatives.¹⁷ When dealing with technical or less politically explosive legislation or in fulfilling obligations imposed by the Constitutional Court, it has often taken a robust approach in scrutinising and amending legislation after significant input from civil society. A case in point is the passing of the Civil Union Act,¹⁸ aimed at giving effect to the Constitutional Court judgment¹⁹ that required Parliament to extend the rights and status available to heterosexual couples in terms of the Marriage Act to same-sex couples. After extensive public involvement – including the facilitation of hearings across South Africa – the Portfolio Committee on Home Affairs drastically amended the draft legislation after civil society groups pointed out that the original Bill failed to comply with the requirements of the Constitutional Court judgment.

However, in more politically charged cases the independence of Parliament vis-à-vis the executive has been called into question. For example, after the ANC adopted a resolution calling for the abolition of the Directorate of Special Operations (also known as the Scorpions) at its 52nd conference at Polokwane in December 2007,²⁰ Parliament quickly adopted the National Prosecuting Authority Amendment Act²¹ and the South African Police Services Amendment Act²² to give effect to this resolution, effectively disbanding the Scorpions and creating a new body under the auspices

of the South African Police Services. This led to some complaints that the absence of real debate on the legislation demonstrated that Parliament merely acted as a rubber stamp for decisions of the governing party. In this way, the Scorpions saga tarnished the image of Parliament as the engine room of our democracy and created the perception that the majority of MPs feel they are more accountable to the majority party than to voters.

A further concern highlighted by the Independent Panel Assessment of Parliament is the failure of Parliament to adopt constitutionally required legislation, despite the fact that the Constitution stipulates that “all constitutional obligations must be performed diligently and without delay”.²³ To its credit, Parliament finally adopted the Money Bills Amendment Procedure and Related Matters Act²⁴ early in 2009. This provides for a procedure for Parliament to amend money Bills – those that levy taxes and vote budgets. Before the enactment of the legislation in 2009, the Minister of Finance tabled such Bills in Parliament, and although Parliament could discuss them it had no power of amendment. This has now been remedied, giving Parliament a bigger voice in the budget-making process and enabling it to fulfil its oversight function in this regard more effectively. However, other Acts that the 1996 Constitution required Parliament to adopt without delay have not been passed.²⁵

The NCOP has a unique role to play, especially regarding ordinary Bills affecting provinces – so-called section 76 Bills. Because provincial legislatures and the national Parliament have concurrent lawmaking jurisdiction over many important areas affecting service delivery – including education, environment, health services, housing, policing, public transport, tourism, trade and welfare services²⁶ – and because the NCOP is supposed to ensure that provincial interests are taken into account in the national sphere of government, NCOP provincial delegations must obtain a mandate from their respective provincial legislatures before casting a single vote for or against legislation passed in terms of section 76.²⁷ An Act of Parliament was supposed to have been enacted providing for a uniform procedure for provincial legislatures to authorise their delegations to cast a vote on their behalf, but this has not happened. As a result, each provincial legislature currently determines its own procedure.²⁸

Effective provincial input in the passing of section 76 Bills is essential, as the Constitution envisages that provinces should be responsible for their implementation.²⁹ However, because no legislation has been passed and because the NCOP lacks resources and clout vis-à-vis the National Assembly, there has been a lack of planning and a coherent programme to ensure that provincial legislatures have adequate information about Bills, so that they can make informed decisions about them. Often adequate time is not provided for discussion involving ministers in executive councils and members of provincial legislatures in each province so that the final Bill addresses the particular needs of each province.³⁰ Because the process is not well organised and planned and because legislation has not been passed, provincial legislatures are often placed under significant pressure to develop voting mandates on important pieces of legislation in a very short time. In some cases legislatures receive no more than a few hours to obtain a mandate, and this has severely hampered the NCOP.

Parliament has been less successful in exercising its second important responsibility, namely holding all executive organs of state accountable,³¹ maintaining oversight of the exercise of executive authority, including the implementation of legislation,³² and maintaining oversight over any organ of state.³³ Once again, the reasons for this are complex, but they are directly related to the electoral system and the dominance of one party in Parliament. The Constitution gives Parliament a broad mandate to ensure that the government is kept on the straight and narrow, that money is spent wisely and that legislation is implemented effectively. Ministers and the leaders of other organs of state have a constitutional duty to account to Parliament for the exercise of their powers³⁴ and must provide Parliament with full and regular reports on matters under their control.³⁵

The oversight function forms part of the separation of powers doctrine, which is not explicitly included in the Constitution but which the Constitutional Court found is implicit in the Constitution's very structure.³⁶ A problem may arise because the Constitution does not establish a strict separation of powers, and the legislative and executive functions are, therefore, not strictly separated and may sometimes be performed by the same persons, as most members of the executive are also members of Parliament. Because members of the executive are usually senior members of the governing party and also serve in Parliament, more junior members of the governing party are often required to oversee and hold to account members of the executive who are also party leaders.

Given the list system of proportional representation, which makes individual members of Parliament accountable to their respective political parties and not directly to the voters who elected them, and because of a tradition of strict party discipline requiring members of Parliament to toe the party line, it may be difficult for Parliament to exercise its oversight mandate over the executive.³⁷ Members of Parliament can also unceremoniously be removed from Parliament by their parties,³⁸ further limiting their ability and willingness to take on members of the executive. The latter often also serve in leadership positions in the party and may have some influence on whether members appear high enough on party lists to be re-elected to Parliament. There is thus a strong incentive to avoid confrontation and open criticism of senior members of the executive – even when this is manifestly called for and in the interests of voters.

The Independent Panel Assessment of Parliament thus recommended that Parliament should consider the impact of the party list system as it is currently structured and alternative systems. The panel expressed the view that the current system should be replaced by a mixed system which attempts to capture the benefits of proportional representation (most pertinently, the fair representation of all parties in Parliament that have demonstrable electoral support), while incorporating aspects of a constituency-based system to ensure that more independently minded politicians with a power base in their constituencies are elected to Parliament.³⁹

This would be an excellent move, but unfortunately, the chances of it happening are rather slim. The reason is that the present electoral system entrenches the position

of party leaders, while the proposed changes would water down their grip over members of the legislature – not a development that would be welcomed by party leaders across the political spectrum.

The National Prosecuting Authority

The events that led to the firing of the National Director of Public Prosecutions (NDPP), Advocate Vusi Pikoli, from office and the dropping of charges by the acting NDPP against President Jacob Zuma amid allegations of political interference in the work of the NPA, sharply focused attention on the constitutional position of the NPA in South Africa's democratic architecture.

These events tarnished the image of the NPA and led many commentators to question the influence of the executive on individual decisions of the NPA to prosecute or not to prosecute politically connected individuals. The situation has further been bedevilled by the confusion about the exact legal position of the NPA vis-à-vis the executive and the nature of its relationship with the Minister of Justice, who is constitutionally required to exercise final responsibility over the NPA.⁴⁰

An independent NPA that prosecutes without fear, favour or prejudice could help to bolster respect for the law and – indirectly – instil trust in the constitutional system, as it would signal that no one is above the law and that those who break it will face prescribed consequences. At the same time, South Africa has an unacceptably high crime rate and the NPA is required to prosecute criminals successfully and ensure that the crime-fighting priorities of the government of the day are implemented in the realm of criminal prosecution.

To understand the position of the NPA, it is important to recall that the new constitutional order kept intact the apartheid judiciary and the apartheid criminal justice system, which was used (and abused) by the apartheid state to enforce apartheid policies and repress political opponents. The security of tenure of all judges appointed before 1994 was guaranteed, while the prosecuting authority, given more power and independence shortly before the transition to democracy,⁴¹ was kept intact. This compromise between the apartheid state and the incoming ANC government left a criminal justice system and judiciary that was by and large sympathetic to the old order and at best sceptical, and at worst hostile, to the new government's values and ideology. It was in this context that the drafters of the 1996 Constitution devised a delicate arrangement that would create a prosecuting authority able to do its work without "fear, favour or prejudice" while ensuring that the government of the day had a decisive influence on the policies that it followed.

Thus, the NPA was created by the Constitution and its position vis-à-vis the executive was constitutionally spelt out⁴² – but the wording of the constitutional provisions are not as clear as they might have been.⁴³ It is striking that the Constitution does not explicitly guarantee the NPA's independence – although it does require national

legislation to be enacted to ensure that the NPA acts “without fear, favour or prejudice”.⁴⁴ In the *First Certification* judgment,⁴⁵ the Constitutional Court confirmed that the NPA was *not* part of the judiciary but that the reference to the need for it to act without fear, favour or prejudice meant that “there is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts”.⁴⁶

The provisions of the NPA Act must be read in the light of this pronouncement on the NPA's independence. But such independence differs in its legal character from the independence of the judiciary, for the simple reason that it was felt that it would be undemocratic to imbue the NPA with the same degree of independence. An elected government, the ANC argued, has a duty to the electorate to fulfil its election promises and implement its programmes. Prosecuting policies form an integral part of any crime prevention strategy and any democratically elected government must have a decisive say in their formulation.

Given the limited resources available for crime prevention and prosecution, it is inevitable that different governments will have different crime-fighting and prosecuting priorities. If the NPA had the same independence as the judiciary, the government would have no influence on prosecutorial policies and would be unable to pursue the crime prevention policies of its choice. It is for this reason that the Constitution explicitly states that the approval of the Minister of Justice is required in finalising any prosecuting policy.⁴⁷ Although any prosecution policy binding the NPA is formulated by the NDPP, the Minister of Justice must concur with it and it must be tabled in Parliament.⁴⁸ This is also why the Constitution vests final responsibility over the prosecuting authority with the Minister.⁴⁹ These two provisions establish *political* oversight over the prosecuting authority, as they ensure that prosecution policy will, broadly speaking, adhere to the policy commitments of the government of the day.

However, this does not mean that the Minister or President can interfere in the day-to-day running of the prosecuting authority. The NPA is required to make decisions on who to investigate and who to prosecute based on pre-announced policy guidelines. This is a wise arrangement, as it would be untenable if members of the executive had any say in individual prosecutorial decisions. No matter how honourable or admired they might be, they could be tempted to shield friends, comrades or party donors from prosecution while encouraging the pursuit of their political enemies. Even when they do not act with such underhand motives, it is almost inevitable that their actions would create the perception that some people are above the law. This, in turn, would undermine public respect for the rule of law.

In the light of the above, and given the Constitutional Court's assertion regarding the independence of the NPA, the relevant legislation adopted to give effect to the powers of the NPA must be interpreted, if this is reasonably possible, in such a way as to protect the NPA from interference by the Minister or the President in any individual prosecutorial decision.⁵⁰

It is my contention that the NPA Act can easily be interpreted in a way that is consistent with the kind of independence asserted for it by the Constitutional Court. Thus,

the National Prosecuting Authority Act of 1998 confirms that the Minister of Justice has a duty to exercise final responsibility over the NPA, but envisages that this will be exercised by requiring the NPA to give the Minister information about the NDPP's decisions and the reasons for them. The Minister may, therefore, request information on any ongoing investigation or any case in which the NPA has decided to prosecute anyone – including highly charged political cases.⁵¹

It is important to note, however, that the Act does not require the NDPP to ask permission from the Minister or the President to investigate or arrest anyone – no matter how important that person might be. Nor does the Act require the NDPP to inform the Minister or the President of an arrest before it takes place.

The legislation does allow the President (who appoints the NDPP) to recommend his or her removal from office – but only in very circumscribed circumstances. Firstly, the President is allowed to suspend the national director, but must first institute an official inquiry into his or her fitness to hold office.⁵² Unfortunately, the NPA Act does not include safeguards to ensure that such an inquiry is truly independent, as the President can appoint any person – including a fellow party leader – to chair it, while it also allows the inquiry to be conducted in a way that the parties see fit. The President can only remove the NDPP from office on the basis of one of four objectively determinable grounds⁵³: misconduct, prolonged ill-health, incapacity, or the fact that he or she is no longer a fit and proper person. The law makes it clear that the President cannot fire the NDPP because of an “irretrievable breakdown of trust” between the Minister and the director – although this was precisely the reason given for the recent suspension of the national director. It is, of course, advisable that the NDPP and the Minister work closely together. But if the relationship breaks down because the Minister disagrees with the director's handling of individual cases, the absence of trust would not constitute a ground for his/her legal removal from office.

The legislation contains another safeguard – that if the President decides to remove the NDPP from office, Parliament must ratify this decision.⁵⁴ Parliament, therefore, has a theoretical veto over the decision. But when one party dominates Parliament and members of Parliament are elected on the basis of pure proportional representation on a list system, and are to some degree beholden to the party leadership – including the President – for their seats, it is highly unlikely that the majority would veto the President's recommendation.

Despite all the safeguards built into the Constitution and the NPA Act, a perception has taken hold that they have not enabled the NPA to do its job without fear, favour or prejudice. As events have shown, political interference is one of the biggest stumbling blocks in the prosecution of the most serious crimes. The circumstances surrounding the suspension and firing of former NDPP, Vusi Pikoli, and the dropping of charges against President Jacob Zuma, suggest that the somewhat circumscribed independence of the NPA has come under severe strain in recent years because of outside interference. Although it is unclear when the rot began to set in, a seminal moment was former president Thabo Mbeki's suspension of Pikoli as NDPP days after the latter informed him that he had obtained a warrant for the arrest of former national

police commissioner Jackie Selebi and a warrant to search Selebi's premises. At the time, Mbeki denied that the suspension was in any way related to Selebi's imminent arrest.⁵⁵ Later, he appointed Frene Ginwala, former Speaker of Parliament and a member of the ANC's national executive committee, to determine whether Pikoli was fit to hold the office.⁵⁶

After extensive investigations, involving the presentation of evidence by the government and Pikoli and the cross-examination of witnesses, Ginwala published a report which seemed to clear Pikoli of the government's charges.⁵⁷ The report correctly pointed out that the Constitutional Court had held that section 179(4) of the Constitution, which provides that national legislation must ensure that the prosecuting authority exercises its functions "without fear, favour or prejudice", amounted to "a constitutional guarantee of independence". It also pointed out that the court had further noted that "any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts" and concluded that "any attempt by the Minister of Justice to influence prosecutorial discretion in individual cases would therefore be contrary to the Constitution".

But, the report also said:

Sufficient attention has not been paid to the requirement of democratic accountability of the prosecuting authority. In focusing only on independence from political interference they have erred in conflating freedom from control with freedom from accountability. Further, scant attention has been paid to the nature, content and ambit of the 'final responsibility' of the Minister, and even less to the relationship between this responsibility and the prosecutorial independence of the NDPP.

Referring to Chapter 3 of the Constitution, which deals with the principle of cooperative governance between the national, provincial and local spheres of government and all organs of state within those spheres, the report argues that there is an extraordinary onus on the NDPP to cooperate with the President, the relevant Minister and other organs of state, such as the South African Police Services. If this interpretation is correct – and it seems very doubtful, given the Constitutional Court judgment on the NPA's independence – it would place a very heavy burden on the NPA to cooperate with the executive in deciding to issue warrants for the arrest of high-ranking state officials or politicians, or in deciding to prosecute them. The Ginwala Commission found that the Constitution and the NPA Act required Pikoli not only to inform the Minister and the President *before* requesting the issuing of a warrant of arrest for Selebi, but also that he should have acquiesced in Mbeki's request not to proceed with the arrest until the President had taken the steps he deemed necessary in the interests of "national security".

This seems a controversial and rather novel interpretation of the Act and the Constitution, as the legislation does not explicitly require the NDPP to inform the Minister – let alone the President – of any move to arrest anyone, unless he or she explicitly asks for such information. It is unclear that the NPA's constitutional independence,

protected by the Constitution as confirmed by the Constitutional Court, can be squared with this reading, which in effect gives the President veto powers over decisions to issue arrest warrants against highly placed government officials merely because he or she cites “national security”. It is also unclear that Chapter 3 of the Constitution applies to an independent body such as the NPA, as it deals with relations between the three spheres of government, while the NPA is part of the criminal justice system rather than being part of government.⁵⁸

In my view, the Ginwala Commission’s heavy reliance on Chapter 3 of the Constitution completely misconstrues its nature and the constitutional requirements for an independent NPA. Ginwala’s interpretation of the NPA’s constitutional position vis-à-vis the executive acknowledges the independence of the NPA with one hand, then takes it away with the other.

In any event, former president Kgalema Motlanthe decided to recommend the firing of Pikoli to Parliament, which duly adopted a resolution removing him from office on the grounds that he had shown insufficient understanding of “national security” issues. Given that Ginwala did not find that Pikoli’s actions constituted a threat to national security, and that the President can only legally fire the NDPP on very limited grounds, for which a factual basis must exist, Pikoli challenged the lawfulness of his dismissal in court. The outcome of this case will be pivotal, as it may either safeguard or destroy the independence of the NPA from the executive. If the court rubber-stamps the decision by the President and Parliament to fire the NDPP for, in effect, wanting to arrest the police commissioner, it would place future prosecution chiefs in an extremely precarious position, sending the message that the NPA’s constitutional independence is not substantive, but exists only on paper.

All the events described above have tarnished the NPA’s image. Despite the constitutional and legislative safeguards, the perception has now arisen that the authority is open to political manipulation and might have been subject to interference by politicians. What are the chances of it re-emerging to play the role assigned to it by the Constitution?

One of the authority’s main structural weaknesses is the fact that the President, as the head of the executive, has the power to appoint and effect the dismissal of whoever leads it. It must be remembered that this provision was negotiated at a time when former president Nelson Mandela, who was loved and trusted, was at the helm. It was, perhaps, not foreseen that a situation would develop where a powerful executive, led by a political party with overwhelming and sustained political support, would be wracked by infighting. It was also not foreseen that despite the safeguards in the Constitution, the NDPP’s position might be more precarious than realised because of his or her implicit dependence on the President’s goodwill.

Ironically, the much-criticised decision of the ANC-dominated Parliament to abolish the Scorpions, which formed part of the NPA, may help to address some of the serious concerns about the politicisation of the NPA, as it would remove the authority from politicians’ immediate line of attack. Given that it is unlikely that the Constitution will

be amended to remove the President's power to appoint the NDPP, the NPA will probably only be able to play the role envisaged for it in the Constitution once the ANC's dominance subsides. Until then, the dominance of the governing party, coupled with the ascendant position of the executive vis-à-vis the legislature, will mean that the President will retain the extraordinary power to appoint whoever he wishes as NDPP. The implication is that despite institutional guarantees, the NDPP will continue to find it difficult to act in the fiercely independent manner envisaged by the Constitution.

The judiciary

The South African judiciary has been under severe strain over the past two years. Attacks by politicians on judges of the Constitutional Court as a result of Zuma's prosecution, the accusations and counter-accusations of impropriety levelled against each other by the judges of the Constitutional Court and Judge President John Hlophe, and the conviction of a judge for drunk driving have exposed individual judges and the judiciary as a whole to unwelcome critical scrutiny and tarnished the judiciary's image. A debate has also raged about the need to accelerate the racial transformation of the legal profession as a whole and the judiciary in particular. The problems facing the judiciary are bad news, as it plays a pivotal role in South Africa's constitutional democracy. The Constitution, which safeguards the democratic rights of citizens and prescribes the rules of the political game, is the supreme law of South Africa. Law or conduct in contravention of the Constitution must be declared invalid by the judiciary, which must also order that the obligations it imposes are fulfilled.⁵⁹ The judiciary can only perform this function in a fair and appropriate manner if its independence is safeguarded and respected and it enjoys legitimacy among a large section of the population.

Whether the judiciary's independence is secure depends both on institutional safeguards and more intangible factors such as its legitimacy and the experience and independent-mindedness of judges. The Constitution attempts to address such issues, but the institutional safeguards it enshrines cannot on their own safeguard the judiciary's independence and impartiality. The judiciary will only survive and thrive if it wins the trust of a large section of the South African population, who would be prepared to defend its independence and impartiality.

The Constitution builds in several impressive institutional safeguards to ensure that the judiciary fulfils its task diligently and without undue interference by other branches of government. It states that the judicial authority of the Republic is vested in the courts⁶⁰ and guarantees the courts' independence, stating that judges must apply the Constitution and the law "without fear, favour or prejudice".⁶¹ It also prohibits any person or organ of state from interfering with the functioning of the courts⁶² and places a duty on organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.⁶³ These provisions confirm the judiciary's constitutional position as the third – and decidedly *independent* – branch of the government. However, they are not sufficient to ensure that the

judiciary plays its appropriate role in South Africa's constitutional democracy. It is imperative that it is staffed by independent judges able to act without fear, favour or prejudice, who are not easy to remove from office, and are respected and even trusted by the public. The procedure for the appointment and removal of judges is, therefore, of the utmost importance.

The constitutions of 1993 and 1996 provided for a radically different way of appointing judges to the procedure used during the apartheid era. In the new dispensation, the President appoints the Chief Justice and the Deputy Chief Justice, who head the Constitutional Court, after consulting the Judicial Service Commission (JSC) and the leaders of parties represented in the National Assembly. He or she also appoints the Deputy President of the Supreme Court of Appeal, also after consulting the JSC.⁶⁴ The President has a duty to keep an open mind and consider suggestions by the JSC and opposition leaders, but does not have to follow their advice – meaning that he or she still has a decisive say in appointing the leadership of South Africa's two most important courts. The President also has a very limited discretion in regard to the appointment of the other judges of the Constitutional Court. The JSC must prepare a list of nominees containing three names more than the number of appointments to be made, and submit it to the President. The President, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, may then make appointments from the list, and must advise the JSC, with reasons, if any of the nominees are unacceptable and any appointment remains to be made. In such a case, the JSC must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.⁶⁵

Because judges have the power to declare Acts of Parliament and acts of members of the executive (including the President) invalid, on the basis that they contravene the often broadly framed provisions of the Constitution, the judiciary plays a distinctly legal but rather important role in the political process. Although judges have to fulfil their task in an independent manner, their decisions potentially have political consequences. The decisive role of the President, as head of the executive, in appointing the leadership of the judiciary and all members of the Constitutional Court recognises this reality. The President must appoint the judges of other courts on the advice of the JSC, meaning that he or she has no discretion in this regard and must follow the JSC's recommendations.⁶⁶

A key rationale for the establishment of the JSC was to create a more open and independent process whereby judges are appointed to the various courts in a way that balances the influence of politicians and lawyers in the appointments process. To this end, the JSC follows a relatively open process, calling for nominations when vacancies on any of the High Courts occur and conducting interviews with short-listed candidates in public.⁶⁷

The constitutional and legal architecture protects the independence of the judiciary as well as could be expected. The government introduced a draft constitutional amendment in 2005 that would have transferred responsibility for the administration of justice and authority over the administration and budget of all courts to the

Minister of Justice,⁶⁸ but this was later withdrawn. Questions remain, however, about the attitudes of members of the judiciary – many of whom were appointed during the apartheid era – and the effectiveness of the courts. And there are other danger signs. On 8 January 2005 the ANC’s national executive committee said in a statement:

*The reality can no longer be avoided that many within our judiciary do not see themselves as part of the masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will invariably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole.*⁶⁹

This statement has created unease, as some have interpreted it as a call for a compliant judiciary that is loath to upset or interfere with the government’s policies.⁷⁰ Others have argued that the statement should be seen in the light of the generally accepted principle that judges should be accountable to the law and the Constitution.⁷¹ It could be seen as a call for the judiciary to be more aligned with the goals of the government, while not being subservient to it,⁷² and as being consistent with the widely felt need for judicial transformation and a more rights-committed and socially conscious approach by judges.⁷³

What is clear is that there is a need for legislation to deal more comprehensively with complaints against judges. In 2008 Parliament adopted such legislation, although it has not yet come into force.⁷⁴ The new Act will establish the Judicial Conduct Committee to deal with complaints about judges; provide for a Code of Judicial Conduct that will set standards of conduct that judges must adhere to; and provide for the establishment and maintenance of a register of judges’ registrable interests. As the new tribunal will consist mainly of judges, it will have more credibility than the JSC in dealing decisively with complaints that might tarnish the image of the judiciary. However, the Code of Conduct will have to be drafted in consultation the Minister of Justice, prompting criticism of the Act, as it is argued that the executive should not be involved in any way in such matters.

Perhaps the biggest challenge facing the judiciary is that it remains inaccessible to the vast majority of South Africans, who do not have the means to access the courts to enforce their rights or the legal obligations of others towards them. At its Polokwane conference, the ANC adopted a resolution stating that a distinction must be drawn between “the development and implementation of norms and standards for the exercise of judicial functions”, on the one hand, and the “administration of courts, including any allocation of resources, financial management and policy matters relating to the administration of the courts,” on the other.⁷⁵ The resolution states that while the former is the responsibility of the Chief Justice, the latter is the responsibility of the Minister of Justice. This distinction is highly problematic, as many “functions that may be described as administrative bear directly on the exercise of judicial functions, [and] a clean severance of the two is not possible”.⁷⁶ Wesson and Du Plessis also question whether the executive is better placed to administer judicial resources

than the judiciary itself. As judges have an intimate knowledge of courtroom practices and procedures and of the measures necessary to run efficient trials, it seems more desirable that they should remain in control of their courts to ensure that they function effectively and efficiently.⁷⁷ The fear is that if the executive takes control of the administration of courts, this will erode the independence of the judiciary.

Chapter Nine institutions

The creation of South Africa's Chapter Nine institutions – the South African Human Rights Commission, the Commission for Gender Equality, the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Auditor-General and the Electoral Commission⁷⁸ – has often been described as a costly and wasteful mistake. Why this plethora of supposedly independent institutions to act as watchdogs over South Africa's democracy when they are often mired in controversy and seldom seem to deliver the goods?

To evaluate these institutions, one must ask why they were originally considered necessary and how they were intended to operate in safeguarding democracy. One must also take a close look at the institutions to ask whether, *in practice*, they have fulfilled their mandates and if not, why not.

Chapter Nine institutions were essentially established by the Constitution to address many problems associated with the transition from apartheid rule. For some constitutional negotiators, it was clear that to transform South African society, a set of credibly independent institutions should be created whose task it would become to strengthen constitutional democracy.⁷⁹

For these institutions to play their roles, they had to enjoy a degree of independence. However, like the NPA, they are not judicial in nature and generally do not enjoy the same institutional independence as the judiciary in a democratic state. In South Africa, as in other countries, they thus find themselves in a precarious position. On the one hand, the Constitution clearly guarantees their independence and proclaims that they are “subject only to the Constitution and the law, and ... must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice”.⁸⁰ Moreover, section 181(3) of the Constitution requires other organs of state to “assist and protect these institutions” to ensure their “independence, impartiality, dignity and effectiveness”, while section 181(4) states that “no person or organ of state may interfere with the functioning of these institutions”.⁸¹ At the same time, section 181(5) of the Constitution states that these “institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year”.

In the two judgments dealing with Chapter Nine institutions, and another dealing with the concept of independence in more general terms, the Constitutional Court provided some helpful guidelines.⁸² The court found that the determining factor regarding independence is whether, from the objective standpoint of a reasonable and informed

person, there will be a perception that the institution in question enjoys the essential conditions of independence. Depending on the nature of the institution and the tasks it must perform, the stringency of the requirements for independence will differ. An institution dealing with complaints against the legislature and executive, such as the Public Protector, could be said to require more vigorous policing of its independence to ensure its legitimacy in the eyes of the public. The Electoral Commission, whose task it is to deliver a free and fair elections, may also need strong protection.

In principle – if not always in practice – Chapter Nine institutions do have the requisite independence from the government. The Constitutional Court pointed out⁸³ that they cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority, and that they are state institutions that are not part of the government. Independence refers to independence *from* the government. According to the court, these institutions cannot be independent from the national government, yet be part of it.⁸⁴ Logically, then, Chapter Nine institutions were *not* subject to the co-operative government provisions set out in Chapter 3 of the Constitution. They perform their functions in terms of national legislation, but “are not subject to national executive control”.⁸⁵

Section 181(3) of the Constitution states that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their *independence, impartiality, dignity and effectiveness*, while section 181(4) states that no person or organ of state *may interfere* with the functioning of these institutions. The Constitutional Court affirmed the basic principle that Chapter Nine institutions must have some degree of financial independence to function independently and exercise their duties without fear, favour or prejudice. At the same time, the Constitutional Court made it clear that this does not mean that they can set their own budgets – Parliament must provide reasonable funding to enable the institutions to fulfil their constitutional and legal mandates. It is important to note that this task is clearly one to be exercised by Parliament.⁸⁶ This, the Constitutional Court finds, would no doubt entail considerable meaningful discussion, exchange of relevant information, a genuine attempt to understand the respective needs and constraints and the mutual desire to reach a reasonable conclusion.⁸⁷ But when Parliament engages in this process it must deal with requests rationally, in the light of other national interests. This means the institutions must be afforded an adequate opportunity to defend their budgetary requirements before Parliament and its committees.

The Constitution provides for the appointment and removal of the Public Protector, the Auditor General and the members of the various commissions, including the Human Rights Commission and the Commission for Gender Equality. Section 193(1) of the Constitution states that the Public Protector and the members of any commission established by this chapter must be South African citizens; fit and proper persons to hold the particular office; and comply with any other requirements prescribed by national legislation. Sub-section 2 states that when members are appointed to a commission established by this chapter, consideration must be given to broadly reflecting South Africa’s race and gender composition. The Auditor-General must be

a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

The President is responsible for appointing the Public Protector, the Auditor-General and the members of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. But he or she has no discretion in this regard and must make these appointments “on the recommendation of the National Assembly”.⁸⁸ The National Assembly nominations must emanate from a committee proportionally composed of members of all parties represented in the Assembly. If the recommendation concerns the appointment of the Public Protector or the Auditor-General, it must be approved by a resolution adopted with a supporting vote of at least 60% of the members of the Assembly. In the case of members of a commission, the recommendation must be supported by the majority of the members of the Assembly.⁸⁹ The Constitution states that involvement of civil society in the recommendation process may be provided for.⁹⁰

Given these institutional safeguards, are Chapter Nine institutions fulfilling their functions properly? The short answer is that while some bodies have done excellent work, they have not all fulfilled their promise.⁹¹ At the heart of the difficulties they have experienced lies an ambivalence about their practical independence and the need to appoint credible and brave individuals who will act without fear, favour or prejudice against society’s powerful and well-connected. They might rely on the government and its officials for information, resources and goodwill to perform their tasks, but they also have to act as watchdogs over the government on whose cooperation they rely. Moreover, they are headed by individuals appointed by Parliament, while there is limited public involvement in the process leading to their appointment by the President.

A review of these institutions by an Ad Hoc Committee of Parliament clarified many of these issues and made several excellent proposals to bolster their work. But its proposals have not been discussed, let alone implemented. Given the committee’s robust assertion of the need for these institutions to be independent, and given the limited role it envisaged for the executive and the legislature in overseeing them, and in their day-to-day administration, it is perhaps not surprising that the report has not found favour with these two branches of government and that its recommendations have not been debated or implemented. The question remains whether the nature of such institutions – supporting the oversight function of the legislature while acting as watchdog over the legislature and the executive – does not require them to play a more modest role.

These questions came to the fore when ANC Youth League president Julius Malema attacked the Human Rights Commission for calling on him to retract his “shoot to kill for Zuma” rhetoric. The commission urged Malema to apologise for undermining the judiciary and inciting violence, but he hit back, questioning the “calibre” of its leadership and calling on it to “rise above petty politics and execute its mandate diligently, without fear or favour”.⁹² The commission gave Malema 14 days to apologise for his

remarks, but when he refused to do so and it did not follow up on any of its threats against him.⁹³ Such incidents may create the impression that these institutions are not strong enough to weather political attacks by well-connected politicians, and detract from their stature and perceptions of their independence.

As the Ad Hoc Committee found, there are other troubling aspects of the way in which these institutions operate, most notably that they do not have the financial independence required by the Constitutional Court. It emerged during the review that none of the institutions could clearly outline their budget process, with some enjoying more budgetary autonomy than others. A feature that they all shared was that their budgets were located within the appropriations of specific national government departments.⁹⁴ The Deputy Minister of Justice and Constitutional Development indicated in his engagement with the committee that the Department of Justice has no authority to adjust the allocations for Chapter Nine institutions, and that budget allocations are transferred to them by means of direct transfers.

Another troubling aspect is that the appointments process for these bodies seems to be more politicised than is ideal. There is insufficient involvement of civil society in the appointment of commissioners and of the Public Protector and Auditor General. This was seen as a major weakness of the architecture of Chapter Nine institutions and the committee made several pertinent comments and recommendations to improve it. Firstly, it noted that legislation dealing with the establishment of the various institutions prescribed the procedure for the appointment of their members in detail, meaning that there was significant variation in the appointment processes of commissioners and principals. The committee acknowledged that because of their different mandates, powers and functions, it would be incorrect to apply a one-size-fits-all approach to appointments and dismissals for all Chapter Nine and associated institutions, but nevertheless proposed that a reasonable degree of consistency be introduced. Furthermore, the committee acknowledged that this had to be squared with the principle of upholding and protecting the institutions' independence. Secondly, the committee expressed concern about the role of Ministers in the appointment processes of certain institutions, including the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and recommended that this should be transferred to Parliament.

One of the committee's most important recommendations centred on the involvement of civil society in the appointment processes of the Auditor General, the Public Protector, the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. Public involvement is at the discretion of the National Assembly, but the Constitutional Court found in *Doctors for Life* judgement that:

... the general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring

*that citizens have the necessary information and effective opportunity to exercise the right to political participation.*⁹⁵

Although the legislature had considerable leeway in deciding how to facilitate public involvement, this did not mean that courts would abdicate their responsibility to ensure that involvement is indeed facilitated. What matters is that members of the public and all interested parties have a reasonable opportunity to know about the issues and to have an adequate say.

At present, civil society is involved in the appointment of commissioners and office-bearers in Chapter Nine institutions through the nomination of individuals. A committee of Parliament short-lists nominees for interview and the list of recommended candidates is presented to the National Assembly for adoption. The National Assembly's recommendations are then sent to the President for appointment. The Ad Hoc Committee considered the involvement of civil society in the appointments procedures to be an important way of adding value, particularly as it would enhance the transparency and credibility of the appointment procedures. One important way of improving the work done by Chapter Nine institutions was to improve the quality of individuals appointed to them, and if the National Assembly took reasonable measures to ensure the active and meaningful participation of civil society, it could result in a great improvement. Indeed, the committee proposed that lists of short-listed candidates should be published for public comment before selection panels or committees make recommendations to the National Assembly.

Conclusion

South Africa's Constitution created an elaborate and well-considered system of governance aimed at enhancing the quality of our democracy, which entails both representative and participatory elements. Although the electoral system could be criticised for weakening the link between public representatives at national and provincial levels and the electorate they are supposed to represent, in general this architecture is well thought-through, establishing independent institutions and a robust system of checks and balances to enhance and safeguard the functioning of our constitutional democracy. However, the system does not work as well as one would have hoped. There seem to be at least two reasons for this.

Firstly, given the governing party's overwhelming electoral support, it is perhaps inevitable that the checks and balances operate in a less robust fashion than intended by the drafters of the Constitution. It would hardly be fair or appropriate to deny anyone with links to the majority party appointment to any of the bodies under discussion, especially given that those links are more often than not the result of an individual's commitment to the anti-apartheid struggle. At the same time, appointing individuals with strong links to the governing party to independent bodies meant to safeguard democracy holds the danger of eroding the independence of such institutions.

Secondly, South Africa has only recently emerged from its apartheid past and is still establishing a vibrant democratic culture. However, for democratic institutions to work optimally, it is imperative that individuals appointed to them have internalised the values of the Constitution.

ENDNOTES

- 1 For arguments about the importance of institutions for safeguarding and deepening democracy, and how such institutions relate to other economic and social factors, see Eithan B Kapstein and Nathan Converse 'Why Democracies Fail' *Journal of Democracy*, vol 19, 2008, pp.57-68
- 2 *Ex parte Chairperson of Constitutional Assembly, In re Certification of Constitution of the RSA* 1996 1996 (4) SA 744 (CC) par 13
- 3 *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions*
- 4 In 2004 the ANC won 69.69% of the votes cast, while the DA won 12.37% of the vote. In 2009 the ANC was again victorious with a slightly reduced majority, obtaining 65.90% of the vote, compared to the DA's 16.66%. See 'South Africa's General Election' http://en.wikipedia.org/wiki/South_African_general_election,_2009.
- 5 Kapstein and Converse 'Why Democracies Fail', p.61
- 6 It is beyond the scope of this chapter to explore other factors that might influence the course a particular democracy takes.
- 7 Act 108 of 1996
- 8 Section 42(1)
- 9 Iain Currie and Johan de Waal *The New Constitutional and Administrative Law*, vol. 1, 2001, p.33
- 10 Section 42(4)
- 11 Currie and De Waal *The New Constitutional and Administrative Law*, p.135.
- 12 Section 47(3)(c)
- 13 Section 61
- 14 Section 60(2)(a) and section 61(4)
- 15 Section 44(1)
- 16 Section 55(1)(ii) and 68(1)(ii)
- 17 Christina Murray and Lia Nijzink *Building Representative Democracy – South Africa's Legislature and the Constitution*, p.74, 2004
- 18 Civil Union Act 17 of 2006
- 19 *Minister of Home Affairs and Another v Fourie* 2006 (3) BCLR 355 (CC)
- 20 See ANC 52nd National Conference Resolutions, 2007, <http://www.anc.org.za/ancdocs/history/conf/conference52/index.html>,
- 21 Act 56 of 2008
- 22 Act 57 of 2008
- 23 Section 237
- 24 Act 9 of 2009
- 25 Section 219(5) requires Parliament to adopt legislation to establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General and members of other committees provided for by the Constitution. However, this has still not been done, and as the Independent Panel Assessment of Parliament concluded, there is an urgent need to adopt such legislation to remedy discrepancies in the salaries and benefits of these constitutional office-holders. The panel also pointed out that neither the national government nor provincial government has adopted legislation as required by section 6(4) of the Constitution. This section requires national and provincial governments to adopt legislative and other measures to regulate and monitor their use of official languages to ensure that all official languages indeed enjoy 'parity of esteem' and are treated 'equitably'.
- 26 Schedule 4
- 27 Section 65(1) and (2)
- 28 See Schedule 6 Item 21(5)
- 29 Section 125
- 30 *Report of the Independent Panel Assessment of Parliament*, p.27
- 31 Section 55(2)(a)
- 32 Section 55(2)(b)(i)
- 33 Section 55 (2)(b)(ii)
- 34 Section 92(2)
- 35 Section 92(3)
- 36 *South African Association of Personal Injury Lawyers v Heath* 2000(1) BCLR 77 (CC) par 18-22
- 37 *Report of the Independent Panel Assessment of Parliament*, p.36
- 38 Section 47(3)(c)
- 39 *Report of the Independent Panel Assessment of Parliament*, p.37
- 40 Section 179(6)
- 41 Section 5(1) of the Attorney-General Act 96 of 1992. See generally Peet Bekker 'National or Super Attorney-General: Political Subjectivity

- or Juridical Objectivity?' *Consultus*, April 1995, pp.26-31
- 42 Section 179, read with the National Prosecuting Authority Act 32 of 1998
- 43 *Zuma v NDPP* [2008] ZAKZHC 71 par 80-92 and *National Director of Public Prosecutions v Zuma*, 2009, ZASCA 1 par 30-32
- 44 Section 179(4)
- 45 *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996(10) BCLR 1253 (CC) at par 141
- 46 Par 46
- 47 Section 179(5)(a)
- 48 Section 21 of the NPA Act
- 49 Section 179(6)
- 50 See *NDPP v Zuma* par 32. These provisions may appear to conflict but, as the Namibian Supreme Court held in relation to comparable provisions in its Constitution, they are not incompatible. It held (I am using terms that conform with our Constitution) that although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, he or she is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.
- 51 Section 33(2) of the NPA Act states that to enable the Minister to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the Constitution, the National Director shall, at the request of the Minister (a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the national director or a director in the exercise of their powers, the carrying out of their duties and the performance of their functions; (b) provide the Minister with reasons for any decision taken by a director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions; (c) furnish the Minister with information with regard to the prosecution policy referred to in section 21 (1) (a); (d) furnish the Minister with information with regard to the policy directives referred to in section 21 (1) (b); (e) submit the reports contemplated in section 34 to the Minister; and (f) arrange meetings between the Minister and members of the prosecuting authority.
- 52 Section 12(6)(a) of the NPA Act
- 53 Section 12(6)(a)
- 54 Section 12(6)(b)
- 55 See James Myburgh 'Mbeki, Pikoli and Selebi' 8 October 2007, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=83545&sn=Detail>
- 56 Release of the terms of reference for the inquiry into the National Director of Public Prosecutions by Dr Frene Ginwala 3 October 2007, <http://www.info.gov.za/speeches/2007/07100316451001.htm>.
- 57 Report of the inquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, November 2008, http://www.thepresidency.gov.za/main.asp?include=docs/reports/ndpp_enquiry/report.html
- 58 This conclusion seems irresistible given that the Constitution's provisions on the NPA are contained in Chapter 8 of the Constitution, which deals with courts and the administration of justice. While the NPA is clearly not part of the judiciary, it is part of the administration of justice and its only link with the government is provided in section 179(6), which requires the Minister of Justice to have final responsibility over the NPA.
- 59 See section 1(c) which confirms that the supremacy of the Constitution and the rule of law are founding values of the South African state, read with section 2, which states that the Constitution is "the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled". This must be read with section 165(5), which states that an order or decision issued by a court binds any person or organ of state that it applies to, while 172 states that a court has a duty to declare invalid any law or conduct inconsistent with the Constitution.
- 60 Section 165(1)
- 61 Section 165(2)
- 62 Section 165(3)
- 63 Section 165(4)
- 64 Section 174(3)
- 65 Section 174(4)
- 66 Section 174(6)
- 67 Wesson and Du Plessis p.193
- 68 Constitution 14th Amendment Bill
- 69 See 'Statement of the National Executive Committee of the African National Congress on the Occasion of Year 93 of the ANC', www.anc.org.za/ancdocs/pr/2005/pr0110.html
- 70 For views suggesting that the ANC statement was just that, see N Fritz and D Unterhalter 'ANC Confuses Compliance with Constitutional Fidelity' *Business Day*, 14 January 2005; M Ellis 'Judges Should be Free to be Unpopular' *The Sunday Independent*, 23 January 2005.
- 71 Wesson and Du Plessis, p.203.
- 72 Wesson and Du Plessis, p.204
- 73 'Chief Justice Reaffirms Judiciary's Commitment to Transformation' *De Rebus* January 2005.
- 74 Judicial Services Amendment Act 20 of 2008.
- 75 'The Transformation of the Judiciary', <http://www.anc.org.za/ancdocs/history/conf/conference52/resolutions.pdf>
- 76 'Launch of the Report of the Open Society Foundation for South Africa on the Justice Sector

- and the Rule of Law' www.afrimap.org/english/images/research_docs/Bizos%20speech%20AfriMAP%20launch.doc
- 77 At 211
- 78 Section 181(1)
- 79 *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions*, p.3
- 80 Section 181(2)
- 81 The Constitution also guarantees the independence of other institutions, such as the Public Service Commission (section 196(2)(3).), the broadcasting authority (section 192) and the Financial and Fiscal Commission (Section 220(2)). There is no explicit provision for the independence of the Pan South African Language Board, which is established in section 6 of the Constitution.
- 82 *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC)
- 83 In *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC)
- 84 *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC), par 28-29
- 85 *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC), par 31. See Report p. 9.
- 86 *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC), par 29
- 87 New National Party, par 97
- 88 Section 193(4)
- 89 Section 193(5)
- 90 Section 59(1)(a)
- 91 See, for example, 'Public Protector stand-off set to go to court' http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20060807000151289C430422&newslett=1&em=26506a6a20060807ah; Mario Denton and Daniel Vloeberghs 'Leadership challenges for organisations in the New South Africa' *Leadership & Organization Development Journal*, vol. 24, 2003, pp. 84-95
- 92 'ANC youth, Cosatu nobs lash HRC', <http://www.thetimes.co.za/News/Article.aspx?id=793626>
- 93 'SAHRC to discuss Vavi's "kill for Zuma" remark', <http://www.polity.org.za/article/sahrc-to-discuss-vavis-kill-for-zuma-remark-2008-06-23>
- 94 *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions*, p.19
- 95 *Doctors for Life International v Speaker of the National Assembly* par 105. The court also said, in par 115: 'The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.'

BENEATH THE SURFACE: CIVIL SOCIETY AND DEMOCRACY AFTER POLOKWANE

STEVEN FRIEDMAN

Without civil society, there can be no democracy. With only civil society, there can be no democracy either.

The first statement would prompt little opposition in mainstream debate. Indeed, it may seem a statement of the obvious. Central to the idea of democracy is the notion that all citizens have an equal right to a share in decision-making.¹ While this means that each person has the right to participate in public debate and decision-making, in reality citizens exert influence over public decisions by combining with others who share their values or interests. The realm in which citizens do this – where they get together with others to influence law and policy – is civil society, which is where citizens acquire a voice.

The quality of democracy is, therefore, closely bound up with civil society's prospects. The more citizens are able, through organisations that are independent of government, to voice their needs and beliefs to other citizens and public decision-makers, the more public decisions are likely to become a consequence of a process in which the various voices of the people compete for influence and the outcome reflects the voice of the majority that flows from that contest.

The second statement, that focusing on civil society alone would make democracy unattainable, makes a claim that is heard far more rarely in the national debate or among civil society organisations. If we assume that civil society is the only vehicle through which citizens can be heard or that the citizen voice is always and automatically expressed through it, we may obstruct the right of many citizens to be heard, doing democracy as much damage as if we see no role for independent citizens' organisations or seek to reduce them to compliant appendages of government, rather than the means by which citizens tell office-holders what to do.

This tendency to assume that all citizens will enjoy a say if civil society organisations are party to decisions is widespread and often influential. It is, therefore, necessary

to stress that it requires more than a vigorous role for civil society if all citizens are to be heard by government. This realisation brings into focus the reality that civil society is a necessary but by no means sufficient guarantee of democracy.

This correction is particularly needed because, in South African debate, the degree to which civil society is able to express its concerns to government and in public discussion is often taken as the only measure of whether citizens can voice their concerns to those who govern. When government is seen not to hear the voices of the citizens to which it is meant to account, a greater role for civil society is seen as the antidote.

This ignores the reality that many citizens, who have as much a right to be heard as those who take part in civil society organisations, are ignored and rendered voiceless even when civil society is able to speak. Civil society is, by definition, open only to those able to organise, and this usually means that a section of society remains outside it. And where inequality and poverty ensure that a significant section of the citizenry is excluded from the resources and contacts needed to speak in civil society, it follows that many citizens may remain unrepresented by civil society organisations.

As we shall see, this is the reality in South Africa. It ensures that, if we are concerned only with civil society's right to speak, we will muzzle the voices of the many who know what they want from policy-makers but are unable to organise to request – or demand – decisions which reflect their interests and values.

Whether civil society organisations are heard is not the same question as whether citizens are heard. The two need to be distinguished if we are to understand the state of health of our democracy and the strategies needed to ensure that it grows healthier.

This chapter will, within this framework, seek to understand civil society's circumstances and challenges in the current South African political environment. It will use information gleaned from discussions with activists convened by the author and colleagues during 2009 to describe current perspectives on strategic challenges and obstacles among a group of civil society organisations.

It will argue that while there appears to be considerable pessimism among many organisations about their prospects for influence, this may well be based on an inappropriate reading of the challenges facing civil society at this stage in the development of democracy.

Part of the problem, it will insist, is a failure to place civil society's own organising efforts, and the need for these to deepen to society's grassroots, at the centre of strategy. But it will argue, too, that this is part of a wider malaise: a failure to develop an understanding of civil society influence that rests on identifying strategic openings, rather than relying on a sympathetic hearing from government.

It will propose that civil society's influence will only be enhanced if organisations develop a new approach to how to understand constraints and opportunities – one which places the survival of democracy, not current government attitudes, at the centre.

Before doing this, however, there is a need to set the context by discussing civil society's role in democracy and the specific form this has taken in post-1994 South Africa.

Civil society and democracy

Civil society's importance in strengthening democracy is a matter of widespread consensus. But competing views of its nature and meaning require a brief attempt to clarify this concept and its meaning for South Africa's future.

This need is heightened by the reality that civil society has come to be seen as a realm of virtue across the political spectrum. It can be seen as a desirable force by conservatives seeking to limit the state's role in meeting citizens' welfare needs,² and by left-wingers who see it the most effective available field of grassroots action against privilege.³ It is seen by some as a realm in which citizens escape the reach of majority government, and by others as the means by which the majority of citizens claim the decision-making rights to which democracy entitles them. Some see it as a realm for members of the middle classes, whose independent material base is assumed to offer a means of protecting society from state intrusion (meaning that the development of African civil society is determined largely by the degree to which these classes are developed),⁴ others as a vehicle only for popular associations or their allies. And, in one celebrated formulation, the very notion of civil society is considered inappropriate in Africa, since it seeks to impose on the continent a European understanding which obscures the need to "put Africa's age-old communities at the centre of African politics".⁵

The approach adopted here is to see civil society not as the preserve of people and organisations with a higher claim to moral superiority, but as the realm in which the promise of democratic participation becomes a reality. If we all have an equal right to participate, a perfect democracy would be a society in which all citizens can take part fully in all decisions which affect them and in which they desire a say.

While no such society exists, we can assess the health of any democracy by this criterion – the degree to which all citizens participate in all decisions in which they require a say.⁶ Civil society is understood here as the organisations that citizens form in order to enjoy a say, and to try to ensure that government responds to their needs and is accountable to them. This requires that citizens enjoy independent access to the means to organise which, in turn, is only possible if those who wish to organise enjoy access to resources that are not generated by the state.

This may explain why civil society is strongest in African states with more extensive market economies. But it is not restricted to the middle classes – on the contrary, civil society as it is understood here should be accessible to all citizens, and one of the key tests of the health of a democracy is the depth of civil society, the extent to which participation in organisations that seek to influence government decisions filters down to all citizens. Civil society organisations are also the vehicles that enable

working people and the poor to claim the right to participate, provided that they enjoy access to the resources needed to organise.⁷

In this understanding of civil society, breadth is also crucial – participation must be available to the entire society, not simply to those who endorse particular political positions or views of the world. The state of civil society as understood here is a key measure of the state of democracy, because the depth and breadth of participation in civil society determines how many citizens are able to participate in decision-making – the deeper and broader civil society, the healthier the democracy.

This author and a colleague have described the link between civil society and citizen voice in the following words:

*Citizens do not band together in civil society organisations to avoid the state – they do so to ensure that they have a voice in government decisions. The government needs civil society if it is to respond to citizens’ desires and needs – civil society needs government to protect its freedom to associate and to implement the will of citizens expressed by the competing demands and proposals of organisations which give voice to citizens’ concerns. In this approach, voice is paramount – an organisation which provides a voice for as many citizens as possible and is effective in making that voice heard in society and ensuring that its preferences are translated into policy outcomes is therefore considered to make a model contribution to strengthening democracy because it offers a large number of citizens an effective voice in shaping public policy and thus ensures maximum citizen participation in decisions – the prime rationale of democracy. One implication of this approach is that democracy is not furthered only by organisations explicitly created to promote it, such as the many human rights and democracy promotion NGOs which have emerged in recent years. Strong and representative interest associations and social movements are key vehicles of democratisation.*⁸

It follows also from this understanding that civil society is not the preserve of a single section of society. According to Azarya, it is founded on a recognition that all people have similar rights and obligations and that there is a readiness to moderate particular or parochial interests in consideration of some common good.⁹ It is, therefore, not open only to those whose values we share, but to all citizens – a particular set of interests or values can interact with the state through civil society only if all can. It is an important source of democratic pluralism, which depends on “multiplicity, autonomy and organisational diversity”.¹⁰

This point needs to be stressed because, in South Africa, the term “civil society” is often used to describe only a section of civil society. But, if we understand civil society as the realm of citizen voice and we acknowledge that democratic principle requires that all enjoy a say, the test of democracy’s health is not whether our favoured section

of civil society is able to participate, but whether all can. If only one section can participate, many voices are excluded.

And the importance of civil society to democracy lies not in its ability to allow activists with similar views to our own to influence government decisions, but in its role in giving all who participate in it a voice, and thus in broadening the democratic principle that every member of a political community is entitled to an equal say.

Just as civil society is not the preserve of a single section of society so, too, is it not restricted to NGOs. It includes any association in which citizens associate to engage with the state, from trade unions and business associations to small grassroots organisations.

It could be argued that NGOs, despite the immense attention paid to them, are the least important actors in civil society because, in contrast to the other associations, they usually do not speak for large numbers of members and, therefore, do not offer many citizens a voice. This view over-simplifies the issue, because NGOs can play an indirect role in making it possible for citizens to be heard by government. But the point that civil society organisations' importance to democracy must be judged by the degree to which they enable citizens to be heard is central to the approach proposed here.

How does South African civil society measure up to this standard?

Civil society in South Africa

A look at the current state of South African civil society suggests that it is vigorous, effective – and shallow.

Its vigour is demonstrated by the fact that decisions in all three spheres of government are subject to debate and influence by a variety of civil society organisations offering competing perspectives and with an ability to shape the debate – and, in some cases, to prompt government authorities to alter decisions. Perhaps the most celebrated example is that of the Treatment Action Campaign (TAC), which used a variety of tactics to win a change in government policy on HIV and Aids – and to press the government to implement the policy change.¹¹

It is also worth noting that the society's racial divisions have not prevented the continued survival of a diverse and articulate civil society willing to try to hold government to account on behalf of particular interests or values. Black or predominantly black civil society organisations have not endorsed government action uncritically, despite overwhelming black support for the current governing party – a pattern in marked contrast with trends in white Afrikaner society after 1948.¹² This has ensured that government decisions are challenged where they are seen not to be in the interests of citizens – a pattern which has produced a more responsive democracy.

White civil society activity also remains vigorous. Indeed, vehicles established to assist public participation often offer a platform to suburban white organisations whose superior resources give them an advantage, rather than to the grassroots black citizens for whom they are intended.

This does not mean that influence in civil society since 1994 has depended purely on whether organisations can recruit members and marshal convincing arguments. It never does: in all democracies, the part of civil society closest to the ruling party usually enjoys most influence.

This reality was heightened to a degree by the ANC's view of itself as a national liberation movement that represents the aspirations of the entire society – or at least of its black majority.¹³ During the fight against apartheid, the ANC was thus concerned to ensure that the organisations that black people formed became part of the ANC family – the trade union movement was a key case in point.¹⁴

After democracy was achieved, this meant that civil society organisations seen to be part of the broad ANC camp were more influential than others. But it also meant that it was they who often gave citizens affected by government decisions the most effective voice, because in terms of the ANC's approach the most important civil society action often happened within the ruling alliance. This ensured that ANC-aligned civil society was often a vigorous source of opposition to government actions.¹⁵

The evidence does not, therefore, support frequent claims that civil society has been in deep decline since the end of apartheid. This claim assumes that what the anti-apartheid resistance was engaged in before 1994 was civil society activity. But, if we adopt the understanding of civil society proposed here, this is impossible – since civil society is the means by which citizens claim their right to participate in the political decisions that a democratic government makes on their behalf.

Since the vast majority of South Africans could not participate in what was clearly not a democracy but a racial oligarchy deliberately designed to exclude them, this was not civil society activity – it was resistance to domination. The aim was not to participate in government decision-making but to achieve a government in which decision-making would be possible.

This does not mean that the anti-apartheid resistance was unrepresentative or that what it was doing was inappropriate. It does mean that there is a difference between participation in civil society and resistance to an undemocratic regime. Civil society is the means by which citizens with a say in how they are governed exercise that right by combining with others who share their interests or values in order to express themselves. This cannot be done unless people enjoy rights. By definition, resistance to apartheid by voteless and rightless people could not have been civil society activity.

So deeply ingrained is the tendency to see participation in civil society as a sign of moral acceptability that this observation is often interpreted as a criticism of anti-apartheid resistance. It is not – it merely points to the reality that the term “civil society” refers to a particular dynamic that occurs when citizens' organisations use

their right to a say in decisions to interact with democratic governments and that there is, therefore, a clear difference between a civil society organisation operating within a democracy and a resistance movement trying to achieve a democracy.

The point is important not because it may help settle an academic debate, but because it illustrates the inappropriateness of failing to differentiate between a struggle to achieve democracy and the civil society activity that becomes possible when democracy is achieved. Civil society activism did not decline after 1994 – on the contrary, it then became possible for most South Africans for the first time in the country's history.

It follows that the type of popular engagement that was an important part of the fight against apartheid was not going to continue after 1994. We would expect a fight against an oligarchy to be accompanied, where possible, by intense popular mobilisation; we would not necessarily expect this when newly enfranchised citizens seek to engage with the government they elected.

This explains why the sort of mobilisation that occurred before 1994 did not continue into post-apartheid society. But the post-apartheid period has seen significant participation by citizens' organisations in the national debate – in civil society activity. Given the context, the remarkable feature of this interaction is not the alleged decline of civil society activism, but that organisations' engagement with elected government has often been so vigorous, given both the racial divides mentioned earlier and the fact that civil society engagement is an entirely new experience for most citizens.

This does not mean that civil society is without its weaknesses. While the financial problems frequently cited since the mid-1990s as a threat to the survival of civil society are clearly much exaggerated,¹⁶ civil society's inevitable dependence on donor funding may shape strategic priorities and ensure that organisations remain vulnerable. These pressures have obviously increased as the current economic crisis has reduced donor resources.

Even within those that can organise and, therefore, participate in civil society, there are severe disparities in influence – themselves often the consequence of highly unequal access to resources – which ensure that the better-off are heard far more than organisations that may have more to say but lack the means to ensure that anyone listens. Here, as elsewhere, civil society remains a highly uneven terrain where influence is determined by who has which resources and connections – not the number of citizens for whom organisations speak.

As important as these points are, they are overshadowed by strong evidence that civil society in South Africa is itself shallow, because large sections of society do not enjoy access to it. This ensures that, for all the inequalities in civil society, the most important divide between who is heard and who is ignored is not within civil society, but between it and the rest of a society in which many have the formal citizenship rights that allow them a say, but lack the means and the contacts to use them.

Participation in civil society requires a range of capacities and resources – including the ability to gain access to government institutions. Successive studies have

found that the poor continue to remain outside civil society, ensuring that civil society organisations that champion the poor have weak roots among them. This is best illustrated by a discussion of poverty reduction, clearly the area where voices from the grassroots most urgently need to be heard.

Civil society shallowness and poverty reduction

Claims that the poor lack a voice are not speculative. There is clear evidence that their voicelessness hampers democracy's ability to respond to poverty.

There is overwhelming evidence that official development debates and the policies that flow from them are often unaware of the choices of the poor.¹⁷ Thus a lengthy debate at the National Housing Forum in the early 1990s centred on how to extend mortgage finance to the poor – despite overwhelming evidence that the poor do not want mortgages.¹⁸ It is only recently that the importance of social pensions in the life of the poor has been understood, while mass electrification plans were based on the assumption that everyone who received electrical power for the first time would stop using other fuels, which proved flawed.¹⁹ These are all cases in which representative government and sections of civil society who purport to champion the poor were unaware of poor people's preferences, which could have been established speedily if the poor had an organised voice. In each case the effect has been to weaken or derail attempts to tackle poverty.

The problem is not a lack of civil society organisations sympathetic to the concerns of the poor – the civil society poverty hearings during the 1990s and in 2009, and the Basic Income Grant campaign waged by Cosatu and some of its allies, are examples of a continuing interest in poverty in civil society. It is, rather, that civil society organisations seeking to address the concerns of the poor have not yet achieved the representativeness that enables them to reflect accurately the concerns and circumstances of the poor. There is significant civil society activity in support of poverty reduction. But it lacks the capacity to undertake a sustained and co-ordinated campaign against poverty because civil society organisations are not sufficiently embedded among the poor. And this, in turn, may be a consequence not of indifference or incompetence, but of the reality that the poor are found primarily in informal settings where their capacity to organise – and their ability to use collective action to secure policy changes – is heavily circumscribed.²⁰

This does not mean that the poor do not organise or act collectively. But because collective action by poor people is led by organisations unwilling or unable to participate in the national policy debate, such action is unable to make an impact on priorities. A key example is the wave of grassroots protest in local areas since 2005. The concerns and demands of the protesters are usually muffled or obliterated by commentary and reportage which explains away the demonstrations by labelling them "service delivery protests". This is anti-democratic in two ways: because it silences

the protesters by substituting an elite-generated explanation of their actions for an attempt to investigate and listen to their grievances; and because it assumes, inaccurately, that people at the grassroots are passive recipients of government “delivery”, rather than choosing and thinking citizens who demand to part of the discussion on the way in which government should serve them.²¹

Research has found significant grassroots activity by the poor, but most of it is devoted to activities designed to secure “collective sustenance” – “survivalist” mutual aid activities, rather than advocacy for policy change. A key challenge for civil society activities seeking to enhance the representation of the poor may, therefore, be to secure stronger linkages between the grassroots “survivalist” groups on the one hand and civil society organisations, government institutions, media and policy and strategy specialists on the other.²² Until that happens, however, the advocates of policy change will remain cut off from the poor, while the organisations of the poor remain cut off from the policy debate.

For some analysts, this view is contradicted by the rise of “new social movements” which seem to be challenging government policy on behalf of the poor.²³ It is claimed that a range of grassroots movements have emerged – landless peoples’ and shack dwellers’ movements, anti-privatisation forums, electricity crisis committees – to challenge current government policies that are said to force the poor to bear the brunt of economic liberalisation. Intellectuals on the left have hailed them as evidence that the poor are mobilising in defence of their interests.

Social movements have become more active at society’s grassroots than they were several years ago, when some activists and academics projected them as the new voice of the poor. They have also begun to behave more like civil society organisations, engaging with the authorities and using the courts more to pursue demands.²⁴ They have also become more active on the ground: when social protest began to emerge among poor people in 2006, social movements, by their own admission, had no role in these expressions by the grassroots poor. Now, it is common for movements to mobilise citizens to demonstrate.²⁵

But as little systematic research has been conducted on the degree of organisation of the movements, we have scant evidence on their depth and potential for growth. What evidence we have suggests that they offer a voice to some in the areas where they operate, but are not mass movements. While they speak for some of the poor, they do not contradict the conclusion reached here – that the poor remain excluded from formal organisation and, therefore, from civil society.

South African civil society remains a vigorous source of citizen participation in public life and thus a means of holding governments to account. Those sections committed to a more equal society may also, through links with activists in the North, acquire a stronger platform from which to launch activist campaign. Continued and perhaps increased grassroots activity to ensure greater government responsiveness to the urban poor is also possible. In the present circumstances, however, it is likely to

remain too shallow to offer the poor an effective voice in public policy formation or implementation.

This may explain why, with some important exceptions – the TAC and Cosatu’s role in mobilising to challenge ANC decisions with which it disagreed, at least until Jacob Zuma’s election as ANC president in December 2007 – civil society has, for all its vigour, mounted relatively few effective challenges to government policy since 1994 and has often been reduced to making suggestions that government decision-makers are free to ignore.

As we will show, strategic attitudes in civil society have obstructed effectiveness. But the lack of a strong base in society – and a consequent reluctance to mobilise and form alliances aimed at galvanising public opinion in their support – have also been an important constraint for civil society organisations. The oft-heard government claim that civil society organisations have no right to tell elected representatives what to do because, unlike democratic government, they are not elected by citizens, is often a self-serving misrepresentation of the way democracy works. But it contains a kernel of truth, for it points to the degree to which civil society’s ability to steer government in directions it would rather not go is a consequence of weak roots in society and, therefore, a very limited ability to mobilise citizens to influence decisions.

Current perspectives: civil society contemplates its constraints

The preceding analysis broadly describes the state of civil society and its role before the change of ANC leadership in late 2007. The key question now is whether the political changes triggered by the leadership change have opened or closed opportunities for civil society to play a more influential role.

Very broadly, the changes in the ANC during this period have opened three lines of analysis, each of which has different implications for civil society organisations. The first sees the changes as a threat to the limited influence that civil society has enjoyed since 1994. In this view, the new leadership is far more interested in putting its stamp on society than in listening to independent voices. This obviously suggests that civil society organisations that do not enjoy links with the ANC leadership are likely to be banished even further into the wilderness than has been the case over the past decade.

The second view is almost its polar opposite. It sees the new ANC leadership as a rebellion against centralised, “top down” leadership which silences voices that it would rather not hear. The challenge to former president Thabo Mbeki has, it is argued, freed not only the ANC but the society from the dead hand of direction from the top. The result must be the removal of the constraints that have silenced debate, and this will open up new opportunities for civil society organisations to express themselves and influence government decisions.

The third view is sceptical of the intentions of both the new leadership and the leadership that it replaced. But it argues that the changes must necessarily open up new spaces for civil society influence, because the fluidity they have introduced means that the new government leadership is not united and has no agreed vision for the future. In this context, it is argued, decision-makers are more likely to take civil society seriously, both because divisions in the ANC mean that they will be searching for allies and because the fluidity means that they may be looking for solutions to governance problems.

Which of these views is supported in civil society? If a series of discussions with civil society organisations over the past few months²⁶ is a guide, pessimism remains the dominant perspective.

The discussions, held between May and July 2009, brought together organisations that are mainly part of that section of civil society which works for an extension of rights and greater social equity, with organisations working on gender issues being particularly prominent. Not all were part of this camp – in an attempt to ensure that the discussions tested views and experiences across the spectrum, participation was also sought from “apolitical” organisations and from two organisations seeking to speak for white Afrikaners. This means that the discussions offer important insights into the degree to which all of civil society can participate. But much of the analysis presented here will be misleading unless it is understood that the dominant perspective was that of “progressive” organisations seeking a more inclusive and equitable society.

In the view of most organisations, but particularly those pressing for the expansion of human rights on issues such as gender and sexual preference, the political changes in South Africa hold far more threat than promise. First, they detected a change in the rhetoric of ruling party politicians on issues such as sexual preference – remarks by President Jacob Zuma were cited as evidence, and the fact that they were later retracted was not seen as significant. This, it was suggested, is just one example of an environment in which rights that seemed fairly entrenched before 2008 – at least in principle – are under threat. Another example, it was argued, is a more hostile attitude to the rights of accused persons, sometimes portrayed by politicians as an obstacle to the fight against crime.²⁷ It was argued that political change has enabled sections of the new ANC leadership to express socially conservative views that were previously taboo in government. This would clearly weaken the influence of human rights activism, but the consequences could be more severe: the society could face an erosion of rights that will not only reduce the influence of civil society organisations advocating rights-based solutions, but also threaten the climate of relative tolerance in which civil society organisations have operated.

A further source of pessimism was a claim that political pressure is being placed on oversight bodies – including institutions such as the South African Human Rights Commission – that are threatened with budget cuts if, for example, they try to hold ANC politicians to account.²⁸ While this remains a claim only, it illustrates a very high

level of apprehension that constitutional protections that have made civil society activity possible are under threat.

Secondly, it was argued that ruling party politicians are now far more inclined to value party loyalty. This had two consequences – greater intolerance for groups and individuals who are not considered loyal to the ruling party, or a propensity to ignore them, and a greater tendency to rely on the ANC and its members to debate and resolve issues, rather than on citizens organised independently in civil society. Civil society influence was therefore more difficult to wield and increasingly dependent on loyalty to the ruling party. Activists noted that a greater emphasis on party loyalty is also bound to affect relations between civil society organisations and dynamics within them. Because civil society is inevitably ideologically and politically diverse, it was divided along several axes, including support for and opposition to the ANC. A stress on party loyalty was likely to create tensions between organisations sympathetic to the governing party and those independent or critical of it. And the closer the civil society organisation was to the governing party, the more likely it was that pressure would be exerted in its ranks to ensure loyalty to the current ANC leadership.

This second point is important if it is recalled that civil society is a realm in which citizens express voice in the organisations they join, as well as to political power-holders – suppressing voices in civil society organisations is, therefore, a significant diminution of democracy. The extent to which this practice threatens democracy obviously depends on how large and influential the organisation is.

For some participants, these negative trends were most evident in the country's largest civil society organisation, Cosatu.²⁹ Firstly, it was claimed that the union federation is reluctant to form alliances with other civil society organisations – presumably, it was said, because working with organisations which may be critical of the current government seems disloyal to the ANC. Secondly, it was claimed that debate in Cosatu has become more restrictive the closer it has moved to the ANC in government, and that there are now considerable pressures to emphasise ANC achievements and ignore failures. The removal of former president Willie Madisha because he was assumed to support ex-President Mbeki³⁰ was, it was suggested, part of a wider trend towards a conformity in support of government.

Thirdly, fears were expressed that, although politicians in power make “the right consultative noises”³¹, spaces for civil society influence are not opening up. The encouraging statements could, therefore, prove to be electoral posturing. As a consequence, even when civil society organisations are able to engage the government on policy, they have little or no impact on the ensuing decisions. Activists engaged in pressing for change on, for example, gender violence and land reform described participating in policy processes that produced no real change in policy or government practice. At most, it was suggested, the new political leadership speaks the language of engagement and listening while acting rather differently: government decisions, in this view, remain at least as immune to influence as they were under the old ANC leadership.

These views were not unanimous. But they were dominant, particularly among groups concerned to deepen and broaden human rights and those fighting for greater social equity. They are based on evidence rather than an excess of anxiety – politicians did, indeed, make the statements that are worrying a section of civil society, while the judgment that there is no greater opportunity for civil society to influence decisions, and that this space may well be narrowing, is clearly based on real experiences. There is, therefore, no reason to challenge the evidence on which these conclusions are based. Nevertheless, there does seem to be good reason to invite a rethink of the claim that opportunities for civil society influence – and, therefore, for an important dimension of citizen voice – are narrowing.

From worry to strategy

Before discussing the strategic implications of current political trends, it is worth mentioning that aspects of the critique discussed here may exaggerate the constraints facing civil society.

First, it is possible that some of the “new” trends identified by civil society organisations are aspects of an environment that civil society has been living with for some time. The complaint that government is no longer willing to listen to civil society obviously acknowledges, by implication, that it was not all that willing to listen before: while participants cited convincing evidence that government is talking to them but not listening, few offered evidence that its willingness to listen has diminished.

It is also important to stress that the complaints that Cosatu avoids alliances with critics of the ANC and tailors strategy to the exigencies of ANC politics are hardly new – they were voiced by social movements and their intellectual sympathisers during much of the Mbeki administration. Where Cosatu at that time formed alliances with others in civil society – for example, with the TAC to press for a comprehensive response to HIV and Aids – its alliance with the ANC seems to have imposed constraints on it even then. For example, it declined to participate in the TAC’s conscientious objection campaign directed at the Mbeki government.³²

Some civil society activists also suggested that Cosatu’s failure to participate in campaigns launched by other organisations may have less to do with a conscious political decision than a long-standing reluctance to take on new responsibilities that might drain its resources.³³ It may well be, therefore, that Cosatu is not displaying a new commitment to political loyalty, but a rather old reluctance to jeopardise its role in the ANC alliance or to take on issues about which its members are not immediately concerned. What appears to be a shift may, therefore, be a well-established pattern. And if civil society organisations could influence events in the previous unfavourable context, they may well be able to do so in this one.

Secondly, while there have been attacks on rights that may not have been politically possible a year or two ago, this does not mean that such positions are unanimous – or even a majority view. While participants in the discussions were concerned about

these threats, there was also substantial support for the view that there is considerable disunity in government and the ANC.³⁴ A participant suggested that, while social conservatism prevails among political leaders, “there is ideological fluidity within the state, making it difficult to accurately gauge the issue”.³⁵ If there is both unity and fluidity, it follows logically that the stated positions that concern rights-based civil society campaigners are contested in the ANC and the government. Thus, while Zuma did make statements about gays that indicated deep intolerance while president of the ANC in 2008, he was obliged to apologise, presumably in response to pressure in ANC ranks.³⁶

Thus the greater prevalence of anti-rights rhetoric now may well mean that only differences that have existed in the ANC alliance over the past decade but were previously suppressed are now being aired, not that the social conservatives now rule. The dominant pattern seems to be internal contest, suggesting that rights-based campaigners may have allies as well as opponents in the ruling party and government.

This also has implications for our discussion of Cosatu. If it does transpire, after investigation, that the Cosatu leadership is indeed more concerned to protect its relations with the ANC leadership than to work with others in civil society, this does not necessarily mean that the position is unanimous or that it will last, since tensions between the federation and the current government may well grow, given the almost inevitable clash between Cosatu’s attempts to maximise its influence in the new administration and resistance to this. The claim in much public commentary that Cosatu has unprecedented influence in the current government are contradicted by the union federation’s very public attempts to try to pressurise the new administration to listen to it – on public service pay, for example.³⁷ While some Cosatu leaders may well have promised their constituency that the election of the current ANC leadership would bring immense influence, the fact that the federation continues to make public demands on the ANC, often unsuccessfully,³⁸ suggests that, as the new administration’s term progresses, there will be new tensions between it and Cosatu and, therefore, new possibilities for alliances between the federation and other civil society organisations.

While fears about attacks on rights are understandable – South Africa has no rights tradition and the protections offered by the Constitution are fragile in a divided society with deep inequalities – the evidence presented here suggests that they do not accurately describe the strategic environment facing civil society organisations, as they do not recognise the opportunities and threats it offers. And while the constraints are real, the greatest opportunity for civil society influence is the divided political leadership and the fluidity mentioned earlier. As long as government decision-makers have differing values and interests and there is no rigid ideological consensus among the governing elite, civil society organisations have the potential to win allies among political leaders and to use them as a source of influence.³⁹ As long as there are senior politicians who remain sympathetic to rights, the fact that some of their colleagues are hostile to them need not prevent civil society organisations from advancing closer to their goals.

Evidence that civil society organisations can wield influence even in seemingly hostile environments, provided they identify the issues on which the government may be willing to listen and use their resources strategically, is provided by one of the least likely stories of post-1994 civil society: the success of organisations drawn from the white right. The trade union Solidarity and the activist alliance Afriforum, both born of the white trade union movement and, more specifically, opposition to affirmative action, seem highly implausible candidates for influence with an ANC government committed to racial change. Yet both have perhaps exercised at least as much influence as civil society organisations close to the ruling party. During the discussions, they were far more optimistic about the prospects of working with the government than any other organisation.⁴⁰

There are obvious limits to the influence of groups representing white interests whose key goal is to end or substantially reduce the impact of affirmative action, and they are not about to persuade the government to abandon its commitment to using positive measures to attack inherited racial inequality. But their strength seems to lie in their recognition that this need not prevent them from winning gains for their members on other issues which do not challenge core government policy. They have particularly flourished after Zuma took over the ANC and have benefited from a coincidence of effective strategy and a realisation that the new ANC leadership wants to repair some of the damage it believes the Mbeki administration inflicted on race relations. It seems reasonable to assume that civil society organisations far closer to the ruling party's stated values could win similar influence if they, too, focused on the strategically possible.

At least part of the constraints on civil society influence in the current environment may, therefore, lie in a failure to read the strategic environment and develop effective responses to it; a greater willingness to think strategically about opportunities and constraints would certainly enhance civil society influence. But a more general criticism is that the approach adopts an overly restrictive view of civil society's prospects by focusing excessively on direct contact with the government and on the attitudes of its leaders.

Beyond government: civil society and society

Engagement with government is one of the essential features of civil society activity – it is through civil society that citizens gain the voice that enables them to become democratic participants by seeking to influence government action. But this does not mean that civil society can only engage if government is well-disposed to it playing this role. Civil society organisations in many societies have an important role in pressing governments to become more open to citizen voice, despite the fact that this was not initially what the governments had in mind.

Much of the discussion among civil society activists discussed here, however, seems to assume – probably without realising it – that effective citizenship relies on direct engagement with government to influence policy processes. This is illustrated by a preoccupation with the statements of government leaders, the workings of formal policy processes, and the outcomes of direct interaction between activists and government leaders. If that was so, activists would be entirely correct to insist that, unless the government is willing to welcome them and their concerns into the policy debate, they are deprived of influence. But, while engagement with government is an important part of civil society activity, it is by no means the only one: civil society organisations can influence events without talking to anyone in government for long periods – and in contexts where the government explicitly excludes them from official policy processes. This is not an abstract point in South African conditions – there are clear examples from our experience. The TAC pushed the government to adopt a comprehensive Aids plan and make substantial changes in practice during a period when they were excluded from the official policy forum, the South African National Aids Council.⁴¹ The Basic Income Grant campaign has probably helped to expand the reach of social grants despite operating in an environment in which the government made it clear that their demands would not be met.⁴²

Why civil society activists attach so much importance to the attitudes of government office-bearers is open to varying interpretations. But it is possible that an important factor is the historical link between the fight for rights and equity and the struggle against apartheid. The links, particularly during the 1980s, between the fight for that most basic of rights, the right to vote, and other rights campaigns, are complicated and it is not necessary to analyse them here. But there were obvious links between the two, and the United Democratic Front provided a vehicle through which rights-based activism could become part of the fight against apartheid. Given this, it seems logical to assume that the achievement of democracy in 1994 aroused expectations among activists, who now continued their work in civil society, that politicians friendly to a rights-based and equity-based agenda were now in office and would naturally pursue the concerns of that part of civil society concerned to deepen rights and pursue equity. The assumption that new office-holders were committed to the same goal as the activists may well have prompted a key section of civil society to conclude that all that was required to pursue change was to point out to the new government the desirability of the approaches organisations favoured: no mobilisation and building of alliances was needed, because rights-based civil society and government were on the same side.

The reality, of course, was very different. Since the fight against apartheid was a nationalist struggle for black rights, it inevitably transpired that resistance to some rights – or indifference to them – suppressed during “the struggle” by pressures for unity began to emerge after it. And so the rights issues that had seemed to be supported by a consensus before 1994 turned out to be contested. The pressures on governments once they take office also inevitably entail competition between priorities. This, in turn, means that those who want the government to pursue particular goals cannot assume that it will agree, and that they must work to win the argument.

The realisation that the party that defeated apartheid would not necessarily adopt, once in government, approaches that advance rights and equity was dramatically brought home to the TAC by the Mbeki administration's attitude to HIV and Aids – the fight was so acrimonious partly because activists were shocked and angered that a government that they expected to work with them to address a national health crisis was working against them.⁴³ But this was an extreme instance of the experience of others in civil society who found that people alongside whom they had fought against apartheid were not necessarily allies once the system was defeated. It seems plausible that this background may help explain the extent to which civil society activists still see supportive attitudes in government as important to their work – and why unsympathetic government attitudes prompt such pessimism. But 15 years of democracy have demonstrated that post-apartheid government cannot be relied on automatically to implement the goals of any civil society actors and that action in society to win change is, in this democracy as in others, central to civil society strategy.

If the success of civil society does not depend solely on direct engagement with the government, it is inappropriate to assess strategic possibilities purely through an analysis concerned only with whether government will explicitly endorse civil society positions and work with activists to translate them into law or programmes. It is, rather, necessary to examine the social context to establish whether it opens opportunities for influence regardless of the government's attitude.

To take one example, the TAC strategy was based partly on building a “moral consensus” in society that was meant to change the government position simply because the weight of moral pressure in society would become too great. A related strategic goal was to build alliances in society that would turn that moral consensus into purposive action.⁴⁴ This approach was based on the key strategic assumption that governments are forced to respond to society, however much they may try to insulate themselves from it, and that, if government is not sympathetic to a goal, society may be better disposed to it and sufficiently organised to exert influence. In some cases, even public consensus in government can be an advantage, as it may trigger resistance in society that could turn implacable government attitudes into opportunities, rather than obstacles. The government approach to Aids under Mbeki is an obvious example, and it is surely no coincidence that one of the key campaigns in an influential social coalition that challenged the government was prompted by the government's approach to HIV and Aids.

An approach built on this insight would still need to know about decision-making trends in the government. But it would need to know, too, about strategic alignments in society to understand which social groups may be allies and which opponents. Who in society may rally behind a particular demand, in what circumstances and with what implications is, therefore, as important a question as who in government supports or opposes a call for change. It is this realisation that no doubt prompted some of the participants in the civil society discussions to insist that strategic possibilities for effective voice do exist, even as they decried the government's response to demands.⁴⁵

A concrete example may underline the point. During the discussion, a participant argued that a key goal of the current ANC leadership is, indeed, to reassert the movement's control over society in an attempt to ensure that the ANC, not independent civil society, decides what should be done to meet social challenges and how this will be done. This offered a bleak view of possible influence. But some participants insisted that this attempt is likely to fail, that it will inevitably exclude some of the elite, and that it may well entail imposing on citizens in a way that prompts them to resist.⁴⁶ If this happens, of course, substantial opportunities for civil society influence will open up. Whether or not this analysis is accurate, it does illustrate a plausible possible context in which a civil society preoccupation with politicians' attempts to control, rather than society's likely reaction to this, would ensure that strategic possibilities are missed.

In summary, direct engagement with government is a key determinant of civil society influence – but hardly the only one. It may also be more accurate to see effective direct engagement with government as a consequence, not a cause, of influence. Civil society organisations are likely to enjoy influence over government policy either because they are close to the government or because they have mobilised enough influence in society to force the authorities to listen. Since most civil society organisations do not enjoy the former advantage, the limits and possibilities of influence in the current context will be shaped as much, if not more, by the degree to which they can build influence in the society through strategic alliances as by whether the government wants to talk to them. The social and political environment in which organisations operate is thus a far more important test of influence, or the lack of influence, than the goodwill of government office-holders.

It is here that the shallowness of civil society becomes a key strategic constraint. While influence does not depend only on the number of citizens on whose behalf organisations speak, it is surely trite to point out that organisations that can mobilise a substantial constituency are likely to exert more influence than those that cannot. This analysis has implied that the government claim – in this society and others – that civil society has no right to tell the authorities what to do because government is elected,⁴⁷ and therefore speaks for society, ignores the reality that being elected does not automatically equip politicians to know what their electors want on particular policy issues.⁴⁸ But if we understand civil society as a realm in which citizens acquire voice, it should follow that those who speak for more people have a greater right to be heard. Particularly where civil society organisations purport to speak for the concerns of people at the grassroots, it seems reasonable to assume that the claim is more likely to be taken seriously if the organisations directly represent those on whose behalf they speak.

Civil society influence in contemporary South Africa is hardly guaranteed – particularly for those organisations that are not allied to the ruling party. But the current climate does seem more open to influence than suggested by the pessimism of most civil society organisations – providing that we understand influence as something that must be built in society and recognise that, while sympathetic government attitudes

may help organisations to be heard, this is one of several strategic issues that civil society organisations need to take into account. To see it as the only one is to miss the opportunities that a democratic system offers.

The ‘Rules Rule’: the centrality of constitutional democracy

The preceding analysis has, of course, made an important assumption – that constitutional democracy in South Africa will remain in effect. For without it, civil society cannot organise or seek support in society.

Our argument began by insisting that there can be no democracy without civil society. But the converse is also true – there can be no civil society without democracy. Implicit in the analysis proposed here is that civil society organisations use the rights guaranteed by democracy to acquire a voice on behalf of citizens. Democratic rules are, therefore, the essential precondition for all civil society activity. Clearly, none of the courses of action proposed for civil society organisations in this analysis – such as mobilising public opinion and actively seeking allies in society – is possible unless the democratic rules entrenched in the Constitution remain in force.

This suggests that the key issue facing civil society organisations in the current political environment is not whether government officials are sympathetic to their concerns, but whether the rules of constitutional democracy remain in place, protecting their right to campaign and organise. The discussions showed that there is some recognition of this among civil society activists – part of the discussion referred to revolved around a proposed amendment to the Constitution that would allow Parliament, in effect, to override the Constitution to protect the government from paying in full citizens who launch successful claims against it.⁴⁹ A key concern was that this would narrow the rights available to citizens and could inhibit civil society activity.

But it is not at all clear that civil society activists are as concerned about attacks on the right to speak and organise as they are about the specific rights for which they campaign. If civil society is to flourish in this environment, however, it is essential that its activists realise that the most important rights in the Constitution for those who seek a rights-based order are not those protecting the specific rights of particular social groups (such as women, gays and lesbians), or those seeking to entrench equity by enforcing social and economic rights, but those protecting the right to participate fully in the national debate – if necessary, by mobilising citizens. However sympathetic some in government or the courts may seem to specific rights, these will not endure if they are not defended. “First generation rights” protecting the right to act and speak are essential if that defence is to be possible. If civil society organisations recognise that reliance on contact with government will need to be supplemented by active citizenship if they are to wield influence, the preservation and strengthening of those measures that make this possible must be a key concern for them.

Two specific aspects of this task need to be highlighted. First, while constitutional democracy has protected the right to act and speak of those who are sufficiently connected to participate in the mainstream national debate since 1994, there is substantial evidence that social movements on the ground have been subjected to harassment.⁵⁰ The evidence does not suggest that national political leaders have any role in this attempt to curb grassroots activism: a far likelier explanation is that local political leaders, who are used to a monopoly in their areas and hostile to competition, have used their contacts with police and other local power-holders to ensure that new actors are suppressed. But whatever the cause, this assault on the right to mobilise and organise, so central to civil society activity, has received little attention in the national debate: the only civil society organisations that have expressed concern are the social movements themselves. If civil society organisations do attempt to deepen their roots in society and connect with the grassroots, the right to act on the ground will become crucial. The more political office-holders are persuaded to insist that local leaders allow others to campaign in their areas, the greater civil society influence is likely to be. Achieving free activity in the townships and shack settlements is, therefore, a key civil society strategic goal.

Secondly, the current political turmoil has put pressure on key democratic institutions such as the judiciary, the media and universities. ANC leaders, prompted by Zuma's legal difficulties, have accused judges of being "counter-revolutionary" or of being hostile to democracy if they were seen to be unsympathetic to him.⁵¹ Immediately after the decision by national prosecutors to withdraw charges against Zuma, South Africa Communist Party general secretary (now Minister of Higher Education) Blade Nzimande insisted on action to reform the judiciary. Although Nzimande said he wanted to strengthen judicial independence, South Africa has a long history of politicians claiming to extend freedoms when they plan the opposite – one example being the former National Party government's strict segregation of universities under the Extension of University Education Act – and critics saw his demand as an attempt to control the courts. When Zuma used the same language in his state of the nation address some weeks after the election, this prompted predictable anxiety.

This concern is heightened by the reality that it is possible to undermine checks on government without changing the Constitution, simply by appointing people sympathetic to political power-holders to key posts. At the time of writing, the Chief Justice and several Constitutional Court judges were due for mandatory retirement and the appointment of replacements was an obvious test of the government's intentions. Deputy Chief Justice Dikgang Moseneke had incurred dislike in some circles by delivering a speech that promised to rein in ANC politicians who were not acting constitutionally.⁵² His appointment would have strengthened confidence that judicial independence would be respected, while the appointment of a judge known to be close to Zuma would have heightened anxiety. The ANC has also called for a media tribunal, while ANC leaders, including Zuma, have complained about what they see as members of the public's limited ability to seek redress from newspapers that treat them unfairly. Academic freedom may be threatened by the demand of ANC-aligned youth organisations for the removal of the head of the University of South Africa

(Unisa), Barney Pityana.⁵³ They deny that this is a response to the fact that Pityana is a prominent member of the Congress of the People (Cope) but the coincidence is too great to make this claim plausible. Nzimande has assured Pityana that his job is safe, but fears of further intervention persist.

These developments have, again, received little attention from much of civil society – perhaps because they appear to be disputes between politicians with little relevance for organisations. But an independent judiciary, a free media and academic institutions that are willing to follow the argument wherever it leads remain crucial to the democratic environment that civil society needs – without these institutions, civil society will find it very difficult to act effectively. While organisations will compromise their influence if they take sides in disputes between political parties such as the ANC and Cope, the principled protection of democratic institutions is critical to civil society's future and may, therefore, need to become a key strategic concern of all civil society, a factor that unites organisations across other barriers as an issue of common concern. As this analysis argued earlier, this is because civil society is free only if all organisations are free.

The task for much of civil society is to move beyond a reliance on direct engagement with the government to a strategy that places more emphasis on the need to deepen roots in society. Preserving the freedoms that make that possible is a core civil society concern, and its immediate future may thus depend on how energetically and effectively it unites behind the institutions and rights that make civil society possible.

If democracy is preserved, civil society's possibilities may be far greater than its organisations and activists currently think. If it is not, civil society's prospects will be bleak. As always, civil society and democracy feed off each other: neither will flourish unless the other does.

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PART TWO

IDASA'S
DEMOCRACY
INDEX 2010

100 QUESTIONS

SECTION ONE: Participation and Democracy		
Nationhood		
1.	To what extent do leaders and legal citizens agree on the identity of the nation established by the territorial and legal state?	(8)
2.	To what extent do political leaders agree that democracy is the only appropriate form of making collective decisions for their nation?	(9)
3.	To what extent do political leaders and citizens resort to violence or illegal activity to settle political disputes?	(6)
4.	Do the majority of citizens agree that democracy is the only appropriate form of making collective decisions for their nation?	(8)
Participation and Involvement		
5.	To what extent do citizens participate in political life? Are citizens willing to participate in elections and become involved in other ways to influence government and hold it accountable?	(6)
6.	To what extent do citizens feel prepared and competent to take part in political life?	(5)
7.	To what extent do citizens feel that participation in political life can give them some ability to influence collective decisions?	(5)
8.	To what extent do citizens feel that the impact of their participation will be equal to other citizens?	(6)
Government Legitimacy		
9.	To what extent do citizens feel that the government in general, and the present government in particular, has the right to make binding collective decisions?	(6)
Citizenship Obligations and Duties		
10.	To what extent do citizens meet their legal obligations?	(7)
Tolerance		
11.	To what extent do citizens tolerate ideas, peoples and practices with which they disagree?	(4)
SECTION SCORE: 6.4		

SECTION TWO: Elections and Democracy

Elections

12.	Is appointment to legislative and executive office determined by popular election?	(8)
13.	To what extent are elections for government based on universal suffrage and secrecy of the ballot?	(8)
14.	Do all citizens believe that their vote is secret?	(8)
15.	To what extent do citizens believe that their electoral system reflects the will of the people? How much does the electoral system impact on representivity?	(8)

Equal Votes

16.	Do the votes of all electors carry equal weight?	(8)
17.	To what extent do citizens believe that they have equal influence?	(7)

Open Competition

18.	Is there equal opportunity for all groups who wish to organise and stand for office? Does social grouping make a difference?	(6)
19.	Are all political parties able to campaign free of threat?	(7)
20.	Are all citizens free to form opinions, voice them, persuade others and vote, as they like, free of threat?	(8)
21.	How effective a range of choice does the electoral and party system allow the voters? Is there an open competition of ideas and policies?	(6)

Election Rules

22.	To what extent are voter registration procedures independent of control by government or individual political parties?	(8)
23.	To what extent are election procedures independent of control by government or individual political parties?	(8)
24.	To what extent are the advantages of incumbency regulated to prevent abuse in the conduct and contesting of elections?	(8)
25.	To what extent are voters able to register and to what extent have they registered to vote?	(7)
26.	Are election procedures free from abuse? And to what extent do citizens see election procedures as free from abuse?	(6)

Voter Information

27.	How much information is conveyed to voters by the official election information system?	(7)
28.	How much information about political parties and candidates is conveyed by the news media? And how fairly is this done?	(5)

29.	How much access do political parties have to the media and how equitable is this?	(8)
30.	To what extent do the campaigns of political parties reach all sections of society?	(6)
31.	Do voters know enough about all political parties to be able to make an informed choice?	(6)
Electoral Participation		
32.	How extensively do citizens participate in elections?	(8)
33.	How are citizens able to influence the electoral process in ways other than the vote?	(7)
Progress and Democracy		
34.	To what extent is the management and control of the elections delegated to an independent body?	(9)
35.	Are there mechanisms for the review of the electoral system and are these open to citizen participation?	(5)
Electoral Outcomes		
36.	Are the announced election results congruent with how the electorate actually cast their ballots?	(8)
37.	Do citizens believe that their vote makes a difference?	(7)
38.	Do security forces, the government and political parties accept the election results?	(8)
39.	Do citizens accept the election results?	(8)
40.	How closely do the composition of the legislatures and the selection of government reflect the election outcome?	(6)
41.	How far do the legislatures reflect the social composition of the electorate? To what extent are women represented in Parliament?	(7)
Funding Elections		
42.	To what extent are private donations to political parties permitted and are they subject to regulation (such as transparency and limits), in order to prevent them from having a disproportionate impact on voter choice and electoral outcome?	(3)
43.	Is campaign finance – both income and expenditure – regulated? Are political parties regulated by accepted procedures and non-partisan bodies? How extensive is the independent oversight of election expenditure?	(3)
44.	Is there public financing of political parties?	(5)

SECTION SCORE: 6.9

SECTION THREE: Accountability and Democracy

Executive Accountability and Legislative Oversight

45.	How far is the executive subject to the rule of law and transparent rules of government in the use of its powers? To what extent are all public officials subject to the rule of law and to transparent rules in the performance of their functions?	(4)
46.	How extensive and effective are the legislature's powers to scrutinise the executive, hold it to account, initiate and scrutinise as well as amend legislation between elections? Is the legislature able to hold the executive to account for the implementation of legislation and policy?	(4)
47.	To what extent has legislative and executive power been devolved and what impact has this had on popular control?	(4)

Public Participation and Accountability

48.	How open, accessible, extensive and systematic are the procedures/mechanisms for public consultation and participation on legislation and policy-making? How equal is the access which interest groups/citizens have to influence the law-making process?	(5)
49.	How open, accessible, extensive and systematic are the procedures/mechanisms for public consultation and participation on executive policy? And how equal is the access which citizens have to influence executive policy?	(5.5)
50.	How far does government co-operate with relevant partners, associations and communities in forming and carrying out policies and how far are people able to participate in these processes?	(4)

Law-making and the Budget Process

51.	How extensive are the powers of legislative bodies, and how effective are they at legislating?	(6.5)
52.	How rigorous are the procedures for parliamentary approval, supervision of and input into the Budget and public expenditure?	(8)
53.	How much say does the public have in the development of the Budget? How well do parliamentary procedures allow the public to participate in decisions relating to resource allocation?	(7)

Access to Information

54.	How independent and accessible is public information about government policies and actions and their effects? How comprehensive and effective is legislation in giving citizens the right of access to government information?	(4)
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Accessibility and Independence		
55.	How accessible are elected representatives to members of the public? What impact does the electoral and party system have on the way in which MPs represent people?	(4)
56.	How far are MPs protected from undue influence by outside interests? Are potential conflicts of interest regulated?	(4)
57.	How effective is the separation of public office, elected and unelected, from party advantage and the personal, business and family interests of office holders?	(4)
58.	How independent are the judiciary and the courts from the executive and from all kinds of interference?	(5)
59.	How effective and open to scrutiny is the control exercised by the legislature and the executive over civil servants?	(5)
60.	How far is the influence of powerful corporations and business interests over public policy kept in check, and how free are they from involvement in corruption?	(4)
61.	To what extent is the public service protected from corrupt practices? To what extent are public officials protected from undue influence by outside interests? Are potential conflicts of interest regulated?	(4)
62.	Are public servants who blow the whistle on corruption encouraged and protected? Are citizens who blow the whistle on corruption protected?	(4)
63.	To what extent can the government carry out its responsibilities in accordance with the wishes of the citizens free of interference or constraint from political or economic forces outside of South Africa?	(5)
64.	How far is the government able to influence or control those things that are most important to the lives of its people, and how well is it organised, informed and resourced to do so?	(4)

SECTION SCORE: 4.8

SECTION FOUR: Political Freedom and Democracy

Civil and Political Rights

65.	How free are all people from intimidation and fear, physical violation against their person, arbitrary arrest and detention?	(4)
66.	To what extent are people able to protect themselves against discriminatory treatment by the state?	(6)

67.	To what extent are people able to use the legal system to protect their person and property against the state?	(6)
68.	How effective is the protection of the freedoms of expression, information and assembly for all persons irrespective of their social grouping?	(6)
Freedom of Association and Participation		
69.	How secure is the freedom for all to practise their own religion, language and culture?	(7)
70.	To what extent do people feel free to associate with others in order to influence government? To what extent does government action encourage or discourage people to associate with others in order to influence government?	(7)
71.	To what extent do people organise themselves into associations in order to influence government and to what extent are the associations of civil society independent of government?	(6)
72.	How far do women participate in political and public life at all levels?	(7)
73.	How free from harassment and intimidation are individuals and groups working to protect human rights?	(7)
Political Parties		
74.	How freely are political parties able to form, recruit members and engage with the public?	(7)
75.	How free are opposition or non-governing parties to organise within the legislature and outside of it?	(7)
76.	How fair and effective are the rules governing party discipline in the legislature and within the party?	(5)
77.	How far are parties effective membership organisations, and how far are members able to influence party policy? Are all individual members privy to sufficient information about their party, including details of private donors?	(5)
78.	To what extent are political parties able to aggregate the interests of all social groups?	(6)
Media Rights		
79.	To what extent does the legal system ensure that print and electronic media are free to print or say what they want about those in power in both government and the private sector?	(7)
80.	To what extent are people and organisations able to disseminate their views via print or electronic media?	(5)

81.	To what extent are the print and electronic media independent from government? How pluralistic is the ownership of print and electronic media?	(6)
82.	To what extent do citizens have equal access to adequate information, including news and other media?	(6)

SECTION SCORE: 6.1**SECTION FIVE: Human Dignity and Democracy****Socio-economic Rights Protection**

83.	How far are economic and social rights, including equal access to work, guaranteed for all?	(6)
84.	How effectively are the basic necessities of life guaranteed, including a. Clean, adequate and reasonably accessible water? b. Adequate food? c. Adequate housing and shelter? d. Adequate and unimpeded access to land?	(4)

Health Care

85.	To what extent is the right to adequate health care protected in all spheres and stages of life? Is treatment available for illnesses such as HIV/AIDS? Is access to this treatment equitable?	(4)
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Education

86.	How extensive and inclusive is the right to education and training, including education in the rights and responsibilities of citizenship?	(5)
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Poverty

87.	Are vulnerable groups such as children, the disabled and women adequately protected from poverty?	(6)
88.	How much impact on political participation does poverty have? How far are poor people able to participate in the wider South African society? To what extent are they excluded?	(4)
89.	To what extent is the state "progressively realising" these social and economic rights in accordance with its Constitutional obligations?	(5)

Jobs, and Rights in the Workplace

90.	Is there equal opportunity for all, irrespective of race, in the workplace?	(5)
91.	How far are workers' rights to fair rates of pay, just and safe working conditions and effective representation guaranteed in law and practice?	(7)

92.	How far are wage levels and social security or other welfare benefits sufficient for people's needs, without discrimination (equally)?	(6)
Delivery of Social and Economic Rights		
93.	Are public goods, for example water provision or local services such as waste collection, equally available to citizens and communities at similar levels of efficiency and competence?	(5)
94.	To what extent has privatisation had an impact on the adequate provision of public goods and services?	(5)
95.	To what extent do public-private partnerships or does privatisation facilitate or impede access to socio-economic rights, particularly for the poor?	(5)
96.	To what extent are private companies accountable for the delivery of socioeconomic rights as a result of privatisation or public-private partnerships? To what extent is this accountability overseen by citizens or their representatives?	(4)
97.	To what extent do citizens feel they are receiving equal access to public resources regardless of their social grouping?	(6)
Corporate Governance		
98.	How rigorous and transparent are the rules on corporate governance? And how effectively are corporations regulated in the public interest?	(6)
99.	To what extent are companies duty-bound to play a role in the realisation of socio-economic rights? And to what extent do they prioritise responsible social investment?	(5)
100.	Is the private sector meeting its new obligations, such as in relation to equity and empowerment responsibilities?	(4)
SECTION SCORE: 5.1		
TOTAL SCORE: 5.9		

PARTICIPATION AND DEMOCRACY

BY KATE LEFKO-EVERETT¹

Over the past five years, South Africa has undergone a period of significant political transition and change. Certainly, this period has seen the consolidation of some facets of the country's adolescent democracy: the staging of the fourth free and fair national elections is a clear demonstration of this progress. However, there is also growing evidence of a downturn in aspects of democracy such as citizen confidence in government, the strength of public institutions, the integrity of political leadership and the health of democracy overall.

This decline should be understood in the context of a series of significant events on the political stage, starting with the 2005 dismissal of Jacob Zuma from the office of Deputy President over allegations of fraud and corruption, and the controversial and emotive rape trial that followed. Within the ANC, these events marked the beginning of a deep political rivalry between Zuma and the then President of the Republic and of the ANC, Thabo Mbeki.

Yet the popular, astute and phoenix-like Zuma ascended to the leadership of the ANC with the backing of the so-called "new left", despite corruption charges against him, and unseated Mbeki in the race for the party presidency at the 2007 National Conference in Polokwane.

A mere nine months later, the ANC recalled Mbeki from the state presidency, but in leaving office he was accompanied by a number of high-ranking officials, including 11 Cabinet ministers and three deputy ministers. Kgalema Motlanthe was sworn in as a "caretaker president" for the months leading up to the national elections in April of 2009. At the same time, cracks within the ANC turned into chasms, and the breakaway Congress of the People (Cope) party was launched, championing more "traditional" ANC values, just months before elections.

Other significant concurrent events in the public sphere included: the highly contested decision to incorporate the Directorate of Special Operations (known as the

“Scorpions”) into the South African Police Service (SAPS); charges of fraud, corruption and defeating the ends of justice brought against National Police Commissioner and Interpol head Jackie Selebi; the dismissal of Advocate Vusi Pikoli, head of the National Prosecuting Authority (NPA) and a key figure in both the Zuma and Selebi criminal investigations; and the NPA’s decision to withdraw all charges against Zuma.

All this has occurred against the backdrop of a worsening economic contraction: in 2009, South Africa entered into a recession for the first time in almost two decades.

Cumulatively, these changes have had a destabilising effect, provoking a sense of insecurity among citizens. While public opinion polls suggest that most citizens still believe democracy is the best form of government for the country in principle, the numbers of those who think there are “major problems” with South Africa’s democracy have increased, as have those who feel the country is going in the “wrong direction”. Many citizens feel elected officials are not interested in the concerns of ordinary people, and, outside of elections, participate in political life only in limited ways. Confidence in the independence and efficacy of state institutions is also waning. At the same time, collective action and protests by citizens have increased substantially in number since 2004, many related to slow service delivery and a lack of transparency, accountability and public consultation on the part of government.

This downturn in public confidence gives reason for great concern. It has implications for citizen perceptions of the legitimacy of government and for compliance with the rule of law. Now that elections have come and gone, the question that remains is whether the new administration led by President Zuma can mitigate this downturn in public confidence through, for example, positioning itself closer to citizens, invigorating opportunities for public participation in political life, and demonstrating its willingness to take citizen input into account.

Nationhood

1. *To what extent do political leaders and citizens agree on the identity of the nation established by the territorial and legal state?* (8)

After 15 years of democracy, South African identity remains enormously complex and continues to evolve. Multiple facets of identity persist, including: first, the values of the nation and the rights and obligations of citizens, as set out in the 1996 Constitution; second, the very varying ways in which citizens identify themselves in South Africa; and finally, the identity and policy orientation of the government.

In 2009, there was relatively wide consensus that the identity of the nation remains firmly grounded in the values of the Constitution. These include, as set out in its Founding Provisions, achieving human dignity and equality, non-racialism and non-sexism, the rule of law, and an open, accountable and responsive system of democratic governance.² These values have been consistently upheld through legislation, the

courts and the adoption of international instruments. In 2006, nearly two-thirds of respondents to an Afrobarometer public opinion poll agreed that the Constitution, ten years after it was adopted, “expresses the values and hopes of the South African people”.³ Williams observes that these constitutional values, as well as South Africa’s adherence to international law and human rights instruments, and the compassion underpinning the national reconciliation process, are all characteristic of post-1994 democratic identity.⁴ Mamphela Ramphele adds that the democratic transition and the Truth and Reconciliation Commission (TRC) have also produced a “miracle narrative”, but warns of the risks of making “South Africans feel very special” and heightening a sense of “entitlement to wield power over others.”⁵

At the same time, given both the diversity of citizens and the apartheid government’s segregation and repression of different race and ethnic groups in the country, it is not surprising that many South Africans continue to identify themselves in a variety of different ways, and not only by nationality and citizenship. Williams also conceptualises the ongoing political and ideological processes of continually attempting to “recognise, seek and affirm the diversity of traditions, suppressed histories, and regional and local peculiarities” as part of South African identity itself.⁶

Modes of self-identification do not appear to be mutually exclusive: while Afrobarometer results suggest that most citizens (86%) identify with a cultural or ethnic group, most also indicate that they identify more strongly with their South African identity than with that of a cultural or ethnic group (see Table 1.1). Citizen responses also indicate high levels of nationalism, with more than 80% indicating that they are proud to be South African, want their children to think of themselves as South African, and view being South African as an important part of how they see themselves.

However, as evident in Table 1.1, there has also been a slight decline in a number of indicators of national identity over the past five years: respondents identifying themselves more strongly as South African than with a cultural or ethnic identity dropped from 56% in 2006 to 49% in 2008. There has been a decline in the percentage of respondents who feel citizens should “realise we are South Africans first, and stop thinking of themselves in terms of the group they belong to.” Those who think it is desirable to “create one united South African nation out of all the different groups who live in this country” have declined marginally from 79% in 2004 to 76% in 2008, and those who think it is “possible to create such a united South African nation”, from 75% to 69% over the same period.⁷ Recent Markinor opinion polls have also found that while race has “receded as a primary form of self-identification,” so too has citizenship. Confidence in the prospect of a “non-racial future” for South Africa has also dropped, from 77% in 2007 to 62% in 2008.⁸

Table 1.1: Self-identification⁹

	2004 ¹⁰	2006	2008
Let us suppose you had to choose between being a South African and being [ethnic group]. Which of the following statements best expresses your feelings?			
Only/more [ethnic group]	25	12	10
Equally South African and [ethnic group]	-	26	21
Only/more South African	61	56	49
Not applicable/don't know	14	5	20
Here are some things people say about the way they feel about South Africa. (<i>"Strongly agree" and "agree" responses only</i>)			
It makes you proud to be called a South African	82	89	83
You would want your children to think of themselves as South African	83	89	82
Being South African is a very important part of how you see yourself	83	87	81
People should realise we are South Africans first, and stop thinking of themselves in terms of the group they belong to	82	81	78
It is desirable to create one united South African nation out of all the different groups who live in this country	79	82	76
It is possible to create such a united South African nation	75	76	69

* In 2004, respondents were not given the response option, "Equally South African and ethnic group".

It is also important to recognise the particularly iterative engagement between constitutional values, citizen views and the policy orientation of government. Williams, for example, observes that the foreign policy of democratic South Africa has emphasised the "observance of human rights, the inculcation of a culture of democracy and good governance, a respect for cultural and political plurality, and a commitment to growth, development and progress",¹¹ although critics may take issue with the application of such policy, particularly in Zimbabwe.

Each successive administration has brought with it a distinctive policy identity and orientation, starting with the strong focus on reconciliation, unity and the "Rainbow Nation" under Nelson Mandela's presidency. The Mbeki presidency then introduced an increased emphasis on economic development and service delivery, as well as South Africa's international role. This included a particular focus on locating South Africa politically and socially within the continent, driving the "African Renaissance" and acting as both a "peacemaker and peacekeeper" in other countries.¹²

More recently, the emphasis has once again shifted, in both ANC and government, towards the goal of achieving a "developmental state", which is defined as focusing on the "delivery of development" and the four main imperatives of eradicating poverty, accelerating service delivery, building the economy and transforming the state. According to former Minister of the Public Service and Administration Geraldine Fraser-Moleketi, the role of the developmental state is to "champion the rights of the

poor and marginalised” while “simultaneously ensuring that growth and prosperity attracts capital.”¹³

President Jacob Zuma’s administration has also identified achieving the developmental state as one of ten key priorities for the next five years. Focus areas for meeting this priority, according to the medium-term strategic framework (MTSF) for 2009 to 2014, include: improving the capacity and efficacy of the state; improving the delivery and the quality of public services; entrenching a culture and practice of efficient, transparent, honest and compassionate public service; and building partnerships with society and strengthening democratic institutions.¹⁴

Survey data suggests that these goals are relatively coherent with citizen priorities for the country, which include combating unemployment and poverty, and improving the management of the economy (see Table 1.2). The 2007 World Values Survey (WVS) found that among South African respondents, 59% identified “a high level of economic growth” as the country’s most important aim for the next ten years. A further 42% identified “a stable economy” as South Africa’s most important goal, alongside the fight against crime (42%).¹⁵

Table 1.2: *Most important problems facing South Africa*¹⁶

	2004	2006	2008
In your opinion, what are the most important problems facing this country that government should address?			
Management of the economy	3	3	12
Unemployment	47	39	36
Poverty/destitution	7	11	10
Housing	7	6	5
Crime and security	11	6	9
AIDS	7	6	4

Democracy

2. *To what extent do political leaders agree that democracy is the only appropriate form of making collective decisions for their nation?* (9)
3. *To what extent do political leaders and citizens resort to violence or illegal activities to settle disputes?* (6)
4. *Do the majority of citizens agree that democracy is the only appropriate form of making collective decisions for their nation?* (8)

Fifteen years after the 1994 elections, there continues to be broad consensus in South Africa that democracy is the only appropriate form of government for the country and remains the best system for collective decision-making. The past five years have been virtually without any incident of a political leader suggesting that democracy should be abandoned, or publicly endorsing any other system. No one

has contested the freeness and fairness of the 2009 national and provincial elections. Further, research conducted by Idasa for the United Nations Economic Commission on Africa (UNECA) in 2007 found that, among an expert sample, competitive, multi-party democracy is viewed as accepted and well entrenched, and is not treated with suspicion or disregard.¹⁷

This said, there have, however, been calls from some political leaders for the reform of the current proportional representation system. These have come particularly from opposition parties such as Cope and the United Democratic Movement (UDM). The UDM, for example, has lobbied for “constituencies [to be introduced] to the proportional representation system to ensure that all public representatives are accountable”, as well as separate presidential elections.¹⁸ Cope, similarly, has called for direct elections of all public representatives, on the grounds that this would strengthen direct accountability to citizens.¹⁹

Some recent events have been criticised for being inconsistent with democratic principles, particularly when unpopular decisions by the ANC-led government have been viewed as steamrolling opposition voices – perhaps an inevitable consequence of having a nationally dominant party. A recent example of this was when, following a decision taken by the ANC at Polokwane, the party pushed forward with the controversial decision to incorporate the Scorpions into the SAPS. Before public hearings in Parliament had even concluded, ANC parliamentarian Maggie Sotyu publicly announced: “The Scorpions are going to be dissolved. Our [role] as Parliament is to implement the policies of the ruling party. A decision has been taken in Polokwane that moves to dissolve the Scorpions.”²⁰

Despite these criticisms, most South Africans still agree that democracy is the most appropriate form of government for the country. Eighty-six percent of respondents to the 2007 WVS felt that having a democratic political system was “good” or “very good”. When asked to rate the importance of democracy on a scale of one to ten, with ten representing “absolutely important”, 79% of respondents ranked the importance of democracy as between eight and ten.

However, while most citizens agree that democracy is the best system of government for South Africa in principle, there is also evidence of significant concern over the health of the system at present. Tolerance for other, non-democratic governance systems appears low and in decline, at face value. As Table 1.3 shows, a minority of citizens approve of non-democratic alternative governance systems, and approval levels for military rule, a single-party state or the abolition of elections and the National Assembly have dropped in recent years. Citizen support for some of the individual rights and freedoms associated with democracy has also increased, including the freedoms of association (54-70%), expression (64-78%) and the media (55-80%).

At the same time, citizens also appear increasingly cynical about the functionality of South Africa’s democracy in practice. Between 2004 and 2008, Afrobarometer surveys show an increase in the percentage of respondents who feel South Africa is “a democracy, but with major problems”, from 20% to 32%. Those who feel South Africa

is “not a democracy”, while still a small proportion, have risen from 2% to 7%. Respondents who think the country is “going in the right direction” have fallen dramatically, from 73% in 2004 to only 38% in 2008. When asked to rate the “current system of government with regular elections where everyone can vote and there are at least two political parties” on a scale of zero to ten, in which ten represents the “best form of governing a country”, the percentage of respondents rating the current system as a seven or higher has dropped from 61% in 2004 to 58% in 2008.²¹ Similarly, when WVS respondents were asked to rate the level of democracy in South Africa on a scale of one to ten, in which one represented “not at all democratic” and ten represented “completely democratic”, only 54% rated levels of democracy at eight or higher.²²

Support for a number of democratic practices also appears to be in decline: Afrobarometer respondents who agree that South Africa should hold regular and open elections dropped from 79% in 2004 to 69% in 2008. Those agreeing that multiple political parties are “needed to make sure that South Africans have real choices in who governs them” have dropped from 58% to 31% over the same period, and those agreeing with the legislative authority of Parliament, from 58% to 50%.

Afrobarometer results also show a drop in the percentage of citizens who feel democracy is preferable to any other kind of government, from 71% in 2004 to 67% in 2008, and an increase in those who agree that if the present system does not “produce results soon, we should try another form of government”, from 35% to 45% over the same period. Further, those indicating that they would be willing to give up regular elections and live under a non-elected government, provided that such a government or leader could “impose law and order, and deliver houses and jobs” increased – worryingly – from already high levels of 58% in 2004 to 65% by 2008.²³

Table 1.3: *Attitudes towards democracy and democratic practices*²⁴

	2004	2006	2008
There are many ways to govern a country. Would you disapprove or approve of the following alternatives? (<i>“Strongly approve” and “approve” responses</i>)			
One political party is allowed to stand for election and hold office	26	22	21
The army comes in to govern the country	22	11	17
Elections and the National Assembly are abolished so that the president can decide everything	23	15	15
Let’s talk for a moment about the kind of society you would like to have in this country? (<i>“Strongly agree” and “agree” responses</i>)			
We should be able to join any organisation, whether or not the government approves of it	54	62	70
The news media should be free to publish any story that they see fit without fear of it being shut down	55	62	80
People should be able to speak their minds about politics free of government influence, no matter how unpopular their views may be	64	74	78

	2004	2006	2008
Which of the following statements is closest to your view? (<i>“Strongly agree” and “agree” responses</i>)			
We should choose our leaders in this country through regular, open and honest elections	79	83	69
Many political parties are needed to make sure that South Africans have real choices in who governs them	58	61	31
The representatives to the National Assembly represent the people; therefore they should make the laws for this country, even if the President does not agree	58	58	50
The President must always obey the laws and the courts, even if he thinks they are wrong	56	60	62
If our present system cannot produce results soon, we should try another form of government	35	28	45

This declining confidence in the health of South Africa’s democracy is indeed reason for concern. While citizens still value the ideal of a democracy, demand for democratic practices has dropped. At this moment, citizens seem concerned about ensuring that their own personal freedoms are guaranteed, and less that they are delivered through a strongly democratic government. Factors shaping these negative evaluations of democracy may include, as discussed earlier, significant political changes in recent years, the onset of recession, and perceived government failures to adequately address citizen priorities, including unemployment and poverty and basic service delivery. Collette Schulz-Herzenberg suggests citizen evaluations of democracy are increasingly aligned with the ability of government to produce goods and services, and that failure to do so may lead to a loss of faith in democracy itself.²⁴

Given worsening evaluations of democracy, the increasing sense among citizens that the country is going in the “wrong direction”, and growing approval for another kind of government system that would “produce results soon” or “impose law and order, and deliver houses and jobs”, it is not surprising that citizens are increasingly voicing their concerns outside formal and government channels. The last five years has seen a substantial increase in collective acts by citizens which, while broadly referred to as “service delivery protests”, reflect discontent over a wide range of issues, including corruption and a lack of accountability in government, municipal demarcation, and the slow pace of housing development, water connectivity and electrification. Patrick Bond suggests that South Africa “probably has more social protests per person than anywhere in the world, and notes that the numbers of protests have increased since 2004.

“In addition to more than 30,000 formal ‘gatherings’ from 2004 to 2007, of which most were protests (and around 10% were ‘unrest-related’ involving acts of violence), there are spontaneous protests not recorded by the police, at a rate estimated by independent researchers in Gauteng Province (between 2004 and 2007) to be more than 50% of all ‘service delivery’ protests.”²⁵

Certainly, as Bond suggests, many such protests are legal and peaceful, but others have become acrimonious, violent and destructive, continuing throughout the months following April's elections. For example, in July 2009 residents of Mkhondo in Mpumalanga attacked municipal buildings, barricaded roads and destroyed a railway line, before turning on the mayor's house and foreign-owned businesses, over complaints of poor service delivery and financial mismanagement and corruption in local government.²⁶ In the Western Cape, Khayelitsha residents burned tires, blockaded roads and stoned passing vehicles over complaints of a lack of water, toilets and electricity in the Site C area. Community members have stated that they are "tired of being isolated and treated like we don't exist", and an off-duty police constable was assaulted and seriously injured by protesters in the area in mid August 2009.²⁷ Similar protests have occurred in Jagersfontein in the Free State, in Thokoza and Diepsloot outside of Johannesburg, and in Piet Retief, Rustenburg and Zeerust.²⁸

Participation and Involvement

5. *To what extent do citizens participate in political life? Are citizens willing to participate in elections and become involved in other ways to influence government and hold it accountable?* (6)
6. *To what extent do citizens feel prepared and competent to take part in political life?* (5)
7. *To what extent do citizens felt that participation in political life can give them some ability to influence collective decisions?* (5)
8. *To what extent do citizens feel that the impact of their participation will be equal to other citizens?* (6)

Over the last five years, public participation in elections has remained relatively high, but participation in political life outside of elections has been limited. While interest in politics remains high, research suggests that many citizens find "politics and government" difficult to understand. Further, willingness and ability to contact elected officials and political leaders appear low, and many citizens doubt the impact of their views and concerns on collective decision-making processes.

Voting in national elections remains the primary way in which most South Africans participate in political life: 77.3% of registered voters cast ballots in the 2009 national elections – a slightly higher turnout than in 2005 (76.7%), but lower than in 1999 (89.3%) and 1994 (86.9%). Actual numbers of votes cast have also declined, from 19.5 million in 1994 to about 16.0 million in 1999 and 15.9 million in 2004, before picking up slightly to 17.9 million in 2009. Voter turnout has also been significantly lower at local government elections, at below 50% of registered voters in both 2000 (48.1%) and 2006 (48.4%).²⁹

However, while voter turnout at national elections remains relatively high, citizen participation in other facets of political life is limited. Successive reports of the Public Service Commission (PSC) point to consistently low levels of public participation

in national, local and, in particular, provincial government. The PSC suggests that participation continues to be ad hoc in many departments and describes citizen engagement as “sporadic and rudimentary”. Understanding of the principle of public consultation is narrow, and, according to the PSC, there is an “apparent tendency to see the promotion of public participation as the domain of the executive and not public service officials.”³⁰ While opportunities exist for public participation in Parliament, the 2008 Report of the Independent Panel of Assessment of Parliament found that access to these opportunities was unequal – for reasons including unequal access to resources, media and transport, and time constraints – and noted that in recent years, both “Parliament and Provincial Legislatures have been reprimanded by the courts and the press for not adequately allowing for public participation in legislative processes.”³¹

While these reports suggest that the government has limited capacity and initiative for public participation, active political involvement by citizens also appears only moderate. Afrobarometer survey results from 2006 and 2008 show relatively high levels of citizen involvement in religious organisations, with 39% of respondents indicating that they are active members or leaders of groups of this kind. However, membership of and participation in other kinds of organisations are substantially lower, as shown in Table 1.4. Citizens appear only moderately willing to attend community meetings, and have even less frequently “got together with others to raise an issue” or “attended a demonstration or protest march”. Experience in contacting government officials or political leaders to raise issue of importance has remained very low, but appears to have risen slight over the last five years.

Table 1.4: *Citizen involvement in political life*³²

	2004	2006	2008
Here is a list of actions that people sometimes take as citizens. For each of these, please tell me whether you, personally, have done any of these things during the past year. (<i>All “yes” responses</i>)			
Attended a community meeting	51	60	51
Got together with others to raise an issue	39	45	39
Attended a demonstration or protest march	23	24	19
During the past year, how often have you contacted any of the following persons about some important problem to give them your views? (<i>“Once or more” responses</i>)			
A local government councillor	17	23	27
A representative to the National Assembly	6	5	12
An official of a government agency/ministry	6	6	13
A traditional ruler	9	16	13
Some other influential person	11	12	13
Let’s turn to your role in the community. For each one, could you tell me whether you are an official leader, an active member, an inactive member, or not a member. (<i>“Official leader” or “active member” responses only</i>)			
Religious group	37	47	39
Voluntary association or community group			16

	2004	2006	2008
Community development or self-help association	7	13	
Trade union or farmer's association	6	8	
Professional or business association	5	7	

Note: Empty boxes indicate that the question was not asked in that year.

Low political participation outside of national elections may, in part, be attributable to a lack of resources, access and understanding of the modes of participation available. Many South Africans are interested in public affairs and discuss politics “frequently”, many also find politics and government “so complicated that you can’t really understand what’s going on”. Knowledge of specific political representatives is extremely varying, although this should be understood in the context of numerous changes in government office-bearers and Cabinet reshuffles in the last few years. Yet low levels of knowledge of local government officials – who should represent a direct point of contact between citizens and government – is cause for particular concern. In 2004, only 34% of Afrobarometer respondents could correctly name their local government councillor, and this fell to 14% in 2006.³³

However, beyond preparedness and competency to take part in political life, many South Africans do not feel that their views and concerns are taken into account by their representatives between elections, or that they can have an impact on collective decision-making. In 2008, more than half (53%) of all Afrobarometer respondents felt it was difficult for “ordinary people” to have their voices heard between elections. Only 51% thought it was likely they could get together with others to make local councillors listen to their concerns, and only 38% that the same could be achieved with Members of Parliament (MPs). While close to half of all respondents (47%) had seen “problems with how local government is run” in the year preceding the survey, only 38% felt ordinary people could do something to improve the situation (see Table 1.5). Notably, though, many citizens feel that this inability to influence government decision-making is not restricted to specific groups within the country: the percentage of Afrobarometer respondents who believe their ethnic group has more political power than others has declined from 22% in 2004 to 16% in 2008.

Table 1.5: *Citizen influence over collective decisions*³⁴

	2008
In your opinion, how likely is it that you could get together with others and make: (<i>“Somewhat likely” or “very likely”</i>)	
Your elected local councillors listen to your concerns about a matter of importance to the community	51
Representatives to the National Assembly listen to your concerns about a matter of importance to the community	38
Local government	
When there are problems with how local government is run in your community, how much can an ordinary person do to improve the situation? (<i>“Some” or “a great deal” responses</i>)	38

	2008
In the past year, have you yourself seen any problems with how local government is run? (<i>"Yes" responses</i>)	47
How often, if at all, did you do any of the following: (<i>"Once or more" responses only</i>)	
Discuss the problem with other people in your community	34
Join with others in your community to address the problem	28
Discuss the problems with other community, religious or traditional leaders	24
Write a letter to a newspaper or call a radio show	11
Make a complaint to local government officials, for example, by going in person or by writing a letter	15
Make a complaint to other government officials, for example, by going in person or by writing a letter	14

Government legitimacy

9. *To what extent do citizens feel that the government in general, and the present government in particular, has the right to make binding collective decisions?* (6)
10. *To what extent do citizen meet their legal obligations?* (7)

Declining evaluations of the health of South Africa's democracy, and the perception that citizens have only a limited impact on decision-making between elections, have brought consequences for government legitimacy: defined by Dahl as "a general confidence among the public that a government's power to make binding decisions for the polity are justified and appropriate", or as "acceptance of the rightness of government".³⁵ Mantel³⁶ locates legitimacy in terms of "government processes that are deliberative and justify policy choices with reference to the common good", and Levi and Sacks suggest it is based on the "belief that government deserves support because it is serving the collective good and doing so in a relatively equitable manner".³⁷ Legitimacy is often shaped by perceptions of efficiency, effectiveness and fairness,³⁸ and, according to Longo, is often evaluated in terms of economic performance, institutional conduct, and the character of policy.³⁹

The government's *Towards a Fifteen Year Review* remarks on a recent drop in perceptions of the legitimacy of state institutions, and a "decline in trust in the past two years or so beyond what would be expected only as an effect of the cycle of electoral politics". In particular, it identifies "reduced public confidence in the judicial system", specifically in response to "cases perceived to have either political or racial dimensions", "actions against senior officers in all the branches of the system" and "perceptions that independent institutions have been impacted on by party-political dynamics". All in all, the *Review* suggests, these indicators point to a "faltering trust in government" among citizens.⁴⁰

In so far as it is measured by evaluations of economic performance and the effectiveness and efficiency of institutions, Afrobarometer results also support the *Review's*

conclusions related to declining legitimacy in recent years. Negative evaluations of the impact of government's economic policy have increased: whereas in 2004, 45% agreed that "government's economic policies have hurt most people and only benefited a few", this rose to 49% in 2006 and 61% in 2008. Percentages of respondents supportive of the way government has handled a range of priority issues – including improving the economy, combating poverty and unemployment, and increasing access to basic services – declined between 2004 and 2008. As shown in Table 1.6 below, evaluations of performance in terms of maintaining prices, providing household water and sanitation services, combating hunger, fighting corruption and uniting South Africans into one nation have worsened in particular. Approval for performance in job creation has remained stable, but low. Evaluations of the performance of elected officials have also declined substantially.

Table 1.6: Government performance evaluations⁴¹

	2004	2006	2008
Which of the following statements is closest to your view?			
The government's economic policies have helped most people; only a few have suffered.	48	44	35
The government's economic policies have hurt most people and only benefited a few.	45	49	61
How well or badly would you say the current government is handling the following matter? ("Well" or "very well" responses)			
Managing the economy	58	65	50
Creating jobs	30	25	31
Keeping prices down/stable	39	38	25
Narrowing gaps between rich and poor	34	30	26
Reducing crime	41	35	29
Improving basic health services	56	64	47
Addressing educational needs	58	71	56
Providing water and sanitation services	68	64	50
Ensuring everyone has enough to eat	47	49	30
Fighting corruption in government	47	45	31
Combating HIV/AIDS	54	56	42
Uniting South Africans into one nation	64	68	50
Distributing welfare payments to those who are entitled	73	82	66
Do you approve or disapprove of the way that the following people have performed their jobs over the past 12 months, or haven't you heard enough about them to say?			
The President of the country*	73	77	36
Representatives in the National Assembly	59	56	46
The Premier of this province	68	61	51
Your elected local government councillor	51	38	43

* In 2004 and 2006, this was Thabo Mbeki and in 2008, Kgalema Motlanthe, who had only recently been appointed to office at the time the survey was conducted.

Political theory posits the outcomes of government legitimacy as acceptance of the “right to rule” among citizens and a reduced need for coercion, monitoring and enforcing compliance: conversely, declining legitimacy can bring challenges to upholding the rule of law and encouraging public participation.⁴²

Opinion polls suggest that citizens continue to support compliance with the law, at least in principle. A consistent majority of Afrobarometer respondents agree that the courts have the right to make decisions that people must abide by, that the police have the right to make people obey the law, and – with slightly lower approval levels – that the revenue service has the right to make people pay taxes. Most citizens also maintain that they have not personally experienced corrupt exchanges with government officials through, for example, paying a bribe or doing a favour in order to avoid legal problems or obtain a service. A majority of WVS respondents also described falsely claiming government benefits, avoiding fares on public transport, cheating on taxes and accepting bribes as unjustifiable actions, as shown in Table 1.7.

However, acceptance of normative indicators and principles – arguably – does not constitute sufficient evidence of citizen compliance with legal obligations. The rise in protests in recent years – and specifically, “illegal”⁴³ demonstrations and ones resulting in violence and destruction – as well as already high levels of crime and the outbreak of xenophobic violence across the country in 2008, also exemplify large-scale citizen challenges to the rule of law and to compliance with legal obligations. Levi and Sacks suggest that achieving and maintaining legitimacy requires both the rule of law and the provision of “infrastructure, justice, education and other services that make populations better off than they would be without government”, and that perceptions among citizens that government has not made good on these deliverables – as exemplified by “service delivery” protests – will continue to present a significant challenge to government.⁴⁴

Table 1.7: *Citizen obligations and the rule of law*⁴⁵

	2004	2006	2008
For each of the following statements, please tell me whether you disagree or agree. (“Agree” or “strongly agree” responses)			
The courts have the right to make decisions that people always have to abide by.	68	73	68
The police have the right to make people obey the law.	67	66	64
The tax department always has the right to make people pay taxes.	58	59	58
In the past year, how often (<i>if ever</i>) have you had to pay a bribe, give a gift or do a favour to government officials in order to: (“Once or more” responses)			
Get a document or permit	11	7	8
Get water or sanitation services			7
Get a household service	9	7	
Avoid a problem with the police	9	10	8
Get a child into school	8	4	

	2004	2006	2008
Please tell me for each of the following statements whether you think it can always be justified, never be justified, or something in between. <i>(Scores 1-3 only)</i>			
Claiming government benefits to which you are not entitled			74
Avoiding a fare on public transport			71
Cheating on taxes			75
Someone accepting a bribe			79

Tolerance

11. *To what extent do citizens tolerate ideas, people and practices with which they disagree?* (4)

Although South Africans still share relatively high levels of national identification and believe that the Constitution and its values of equality, non-racialism and non-sexism express the values and hopes of citizens, levels of intolerance are worryingly high, after 15 years of democracy. Recent evidence of this intolerance includes public assaults on women because of the way they are dressed and brutal attacks on the basis of sexual orientation.⁴⁶ The run-up to the 2009 elections saw sporadic outbreaks of conflict between members of different political parties, although such incidents were limited, and were condemned by political leaders.⁴⁷

Research suggests that South Africans remain fundamentally distrustful of the people around them. While 80% of Afrobarometer respondents in 2008 trusted their relatives, only 50% trusted “other people they know” and 35%, “other South Africans”. Further, in spite of the “Rainbow Nation” discourse, racial intolerance persists among groups in South Africa, and research conducted by the Southern African Migration Project (SAMP) in 2006 reveals low levels of favourability towards Coloured South Africans (46%) and Asian/Indian South Africans (40%) in particular (see Table 8).

Table 1.8: *Citizen obligations and the rule of law*⁴⁸

How much do you trust each of the following types of people? (<i>“Somewhat” or “a lot” responses</i>) (2008)			
Your relatives	80	Other South Africans	35
Other people you know	50	Foreigners living here in South Africa	14
How favourable are you towards: (2006)			
Black South Africans	73	People living here from the rest of Africa	16
White South Africans	55	People living here from Europe or North America	22
Coloured South Africans	46	People living here illegally	7
Asian/Indian South Africans	40	Refugees	21
People living here from neighbouring countries	22		

People you would not like to have as neighbours: (2007)			
Drug addicts	91	Coloured people	9
Heavy drinkers	69	People who speak a different language	8
Homosexuals	46	People of a different race	8
Immigrants/foreign workers	25	People who have AIDS	7
Indians	14	People of a different religion	5
Unmarried couples living together	10	Black people	1
White people	10		

Perhaps the clearest indicators of high levels of intolerance, however, are the widespread attacks on migrants in recent years, including the specific targeting of Somali refugees and the massive outbreak of xenophobic violence across the country in 2008. As shown in Table 8 above, favourability towards people from other countries is low, particularly towards “people living here from the rest of Africa” (16%) and “illegal” foreign nationals (7%). According to the WVS, one in four South Africans would not like to have immigrants or foreign workers as neighbours (see Table 8).

Further, SAMP surveys conducted in 1997 and 2006 demonstrated an increased willingness among citizens to take action against “illegal foreigners”, as also evidenced by the 2008 attacks. Sixteen percent of survey respondents in 2006 indicated that they would be likely to “get people together” to force an “illegal foreigner” to leave, and 9% said that they would use violence against such a person. Intolerance appears particularly high towards migrants and refugees from elsewhere in Africa, with 31-36% of survey respondents indicating they would take action to prevent a migrant from another African country from moving into their neighbourhood, operating a business in their area, sitting in the same classroom as their children or becoming a co-worker.⁴⁹

Table 1.9: Likely actions against non-citizens⁵⁰

Likely actions against people from other countries in Africa		2008
Moving into your neighbourhood		34
Operating a business in your area		36
Sitting in the same classroom as your children		32
Becoming one of your co-workers		31
Likely action against an illegal foreigner	1997	2006
Report person to the police	35	44
Report person to his or her employer		32
Report person to local community association	12	36
Get people together to force person to leave	3	16
Use violence against that person		9

Conclusion

In the 15 years that have passed since the 1994 elections, South Africa has made enormous strides in consolidating the democratic system of governance. The staging of the fourth round of free and fair national and provincial elections in 2009, with relatively little conflict and contestation in spite of enormous competition within the ANC and between parties, is strong evidence of this accomplishment.

Survey data shows that many South Africans continue to embrace a strong sense of national identity: one that centres around the values of the Constitution and citizenship, but also acknowledges the plurality and diversity of ethnic and cultural groups in the country. The policy orientation and emphasis of the ANC-led government, and the new administration in particular, appear coherent with the priorities and goals of the majority of citizens, which at present largely focus on better management of the economy, job creation and poverty alleviation.

Further, most South Africans still agree that democracy is a good system and the most appropriate form of government for the country. Support for non-democratic governance alternatives remains low in principle, and is in decline.

However, in the context of significant political and economic insecurity in the last few years, public opinion data also reveals a worrying decline in confidence around the health of South Africa's democracy in practice. Confidence in the prospect of a unified and non-racial future for the country has dropped, and levels of intolerance are pervasively high. Increasingly, citizens feel that the country is going in the "wrong direction" and that the democratic system is plagued by "major problems". Of particular concern is the increase in apparent willingness to abandon democratic practices if certain deliverables closely associated with democracy – such as law and order, job creation and better service delivery – are not achieved soon.

While public participation in national elections has remained relatively high, participation in other aspects of political life is limited. The government's performance in ensuring public participation in the local, provincial and national spheres, and in the legislatures, has often been poor. Further, while many citizens are interested in politics and governance, many also find these difficult to understand, feel their views and concerns are not sufficiently taken into account by elected representatives, and ultimately, do not think they can have an impact on collective decision-making.

Given these declining evaluations of the health of South African democracy, it is perhaps to be expected that citizens are increasingly articulating their concerns outside of formal or government-provided channels: for example, through the substantial rise in protests in recent years, which have at times become acrimonious, violent and destructive. Confidence in the legitimacy of government, often linked to perceptions of fairness, efficiency, effectiveness and institutional performance, appears to be in decline, and this is likely to have consequences in terms of citizen willingness to comply with the rule of law.

The change in government, however, presented an opportunity for the new administration to reinvigorate engagement with citizens by, for example, dedicated efforts to improve opportunities for public participation, and to demonstrate that citizen input is taken into account. Enormous strides will be required to address the fundamental causes of current levels of citizen discontent, including perceptions around the pace of service delivery and greater transparency and accountability on the part of government. At the same time, citizens have shown that they are not willing to wait for change, and the work of the new administration in these respects must begin right away. Failing this, government will continue to face escalating citizen discontent and challenges to the rule of law.

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ELECTIONS AND DEMOCRACY

BY JUSTIN SYLVESTER AND PAULOS ESHETU¹

If free and fair elections were the only yardstick for the health of a democracy, South Africa's democratic experiment would receive a clean bill of health. The success of South Africa's last four elections is a hallmark of the post-1994 period. There are two key components to this electoral system, which has been praised by many for its simplicity, fairness and inclusiveness. The first is a proportional representation system, with no threshold, which promotes multi-party democracy. The second is a closed party-list system, which is used to calculate the conversion of votes into seats in the legislatures.

South Africa's constitutional regime, set out in the 1996 Constitution² and the Electoral Act,³ has been instrumental in establishing a framework for frequent, free and fair elections. The Independent Electoral Commission (IEC), the body tasked with managing South Africa's elections, is independent and enjoys wide legitimacy and public trust. Elections in South Africa have been praised by national and international observers. And, more importantly, elections in South Africa seem to enjoy high levels of public trust and legitimacy – more so than most of South Africa's democratic institutions.

But elections are just one of many indicators of a democracy's health. Others include a democratic political culture characterised by accountability and transparency, an active and engaged citizenry, and a strong and independent institutional framework that represents and responds to the interests of citizens. South Africa is a diverse and divided society, so the presence of an electoral system that promotes qualities of simplicity, fairness and inclusiveness is welcome. But it is in the matter of accountability that South Africa's electoral system is weakest.

The use of the closed party-list system has created an accountability deficit in our democracy. The line of political accountability runs between the legislator and the party executive and not between the legislator and the citizen. Moreover, South Africa has no legislation dealing with political party funding from private sources. This has created a situation in which the public interest is often trumped by the party interest and/or the interest of capital.

This results in the democratic focus being shifted away from the citizen. In a country whose society is characterised by severe levels of poverty and inequality, this becomes a weakness that could develop into a serious threat to the sustainability of our democracy if citizens do not feel that the system of governance is responsive to their interests.

So this section will focus on the South African electoral system and its components in order to assess the state of this important democratic institution. We will also make a case for bridging the accountability-transparency deficit by reforming the electoral system and regulating private funding to political parties.

Elections

12. *Is appointment to legislative and executive office determined by popular election?* (8)
13. *To what extent are elections for government based on universal suffrage and secrecy of the ballot?* (8)

Any universal understanding of democracy should meet two requirements: the people must rule and they must rule equally. South Africa is a classic liberal constitutional democracy where the electoral system satisfies both requirements.⁴ Elections are held every five years, in accordance with the Constitution, using an electoral model known as proportional representation (PR). This model gives equal weight to all votes cast and ensures that every vote counts: if a political party receives 30% of all the votes cast in an election, then it automatically takes 30% of the seats allocated in the legislature concerned.⁵

But there are no direct elections of government executives at the national tier of government. A separate election for the executive was not included in the initial electoral design during the transition period (1990-1993). This was done in order to ensure co-operation between the executive and legislative branches. This has in the long term had the effect, however, of enabling the executive to dominate the legislature in the context of one-party dominance and the closed-party list system. The executive, namely the President, is instead elected by the legislature.⁶ In short, the legislature is the expression of the popular will of the people to choose their representatives. The party with the most seats in a legislature is therefore able to elect one of its members as President or premier.

The Constitution and the Electoral Act of 1998 guarantee all citizens the right to vote in regular popular elections for any legislature. The Constitution states that “every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret”.⁷ However, this is conditional that citizens meet a minimum age requirement of 18 years in order to vote.

To reconcile this constitutional right with reality, the IEC works to address obstacles to maximum voter participation and ensure that voters are able to cast their ballots in secrecy.⁸

14. *Do all citizens believe that their vote is secret?* (8)
15. *To what extent do citizens believe that their electoral system reflects the will of the people? How much does the electoral system impact on representivity?* (8)

Voting secrecy is a safeguard of the integrity of democratic elections for two reasons. First, it promotes voters' freedom of choice by protecting them from the threat of intimidation. Second, it generates legitimacy for the election process and outcome, provided that citizens believe that votes were cast in secret, free from intimidation in the voting booth. Secrecy makes a threat of intimidation or bribery less effective. The Constitution guarantees South African voters the right to mark their ballots in secret.⁹ Moreover ballots, once marked, are also unidentifiable according to the provisions in the Electoral Act.

The Act entrusts the IEC with the task of ensuring that a premium is placed on the secrecy of voting. In most countries privacy screens are used at polling stations. When hand-marked ballots are used, voters mark their choice on a standard ballot, which is then placed in a ballot box with the ballots of other voters, making it impossible to know whom the voter supported.¹⁰

Table 2.1: Voting secrecy¹¹

How likely do you think it is that powerful people can find out how you voted, even though there is supposed to be a secret ballot in this country? (%)					
	Not at all	Not likely	Some-what likely	Very likely	Don't know
Urban	32	29	20	12	8
Rural	31	21	21	16	10
Male	34	24	21	13	8
Female	30	28	20	13	9
Eastern Cape	40	25	11	18	7
Free State	38	17	28	9	8
Gauteng	38	28	19	10	4
KwaZulu-Natal	33	20	17	13	17
Limpopo	24	30	30	9	7
Mpumalanga	31	29	23	15	2
North West	22	27	21	21	10
Northern Cape	30	27	11	12	20
Western Cape	15	34	26	16	9
TOTAL	32	26	20	13	9

But institutional arrangements ensuring secrecy of the vote, as provided for in the Electoral Act, are not sufficient. The real test lies in the public's perception of whether votes are indeed secret and the integrity of elections. According to Afrobarometer's 2008 public opinion survey, when asked how likely it was that powerful people would be able to find out how respondents voted, 32% of respondents said "not at all" and 26% said "not likely." Only 13% answered "very likely." This indicates that citizens largely believe that their votes are indeed secret. In the same survey, 50% of respondents stated that the election of 2004 was "completely free and fair", and 22% said it was "free and fair with minor problems". Thus the high proportion of 72% thought the election was legitimate and fair, while only 7% had a contrary view. The remaining fifth of voters had no view one way or the other.¹²

The Electoral Commission Act (Act 51 of 1996) established the Electoral Court, which is tasked with reviewing decisions made by the IEC. Any party or candidate may bring complaints to the Electoral Court and any appeal must be made in terms of the rules of that court. Through party liaison committees at national, provincial and local levels, the IEC ensures that all political parties are fully engaged with and knowledgeable about the electoral process and procedures. This structure helps to resolve local disputes and is said to be a contributing factor in reducing legal challenges to electoral procedures and results. Additionally, party agents monitor the voting and counting process, further ensuring the integrity of the election.¹³ Given that challenges to electoral results are possible both in theory and in practice, the fact that so few have been made suggests that the public believes that elections reflect the will of the people. Moreover, a survey of public attitudes by Mattes and Southall found that 74% of respondents were satisfied with the "way we elect our government" and 72% felt that the voting system was fair to all parties.¹⁴

With regard to representivity, as a result of the closed party-list system, Parliament is highly representative of South African society in ethnicity, gender and geographic region. The closed party-list system requires parties to provide the IEC with lists of candidates nominated for the legislature, ranked according to preference, prior to the elections from which the IEC allocates candidates to fill seats in Parliament. This is done in such a way that the share of the vote won by a political party is proportionally translated into its share of seats in the legislature. The positioning of candidates on the lists is a product of internal party politics, which allows parties to socially engineer their lists; hence the high levels of representivity in Parliament. Each party submits two lists, one national and the other with candidates listed by province, so as to ensure a fair regional representation.

Parties are therefore able to manipulate their lists to take into account politically sensitive issues such as gender, ethnicity and geography. For instance, the ANC has a 50% gender quota for women on its lists. This lends greater credibility to the legislature as it promotes inclusivity. Voters, however, have no influence over the composition or the ranking of the lists, which is why the system is called "closed". This raises questions of accountability.

The Constitution not only imposes the imperatives of proportional representation and participation by minority political parties, but also insists on accountability by elected representatives to voters.¹⁵ Thus a perpetual debate over electoral reform in South Africa has raged since the adoption of the final Constitution in 1996. This was a key focus of the Electoral Task Team (ETT), convened before the 2004 elections to make final recommendations to Parliament around the electoral system.¹⁶ The electoral system in its current form creates an accountability deficit, a view supported by the ETT. This will be discussed later in the section.

In any event, the fact that the electoral system is considered democratically accurate should not suggest that the racial makeup of Parliament is the most important indicator of democracy, but rather that Parliament being an accurate reflection of the citizenry's political preferences is more important and democratically positive.

Equal votes

16. Do the votes of all electors carry equal weight? (8)

17. To what extent do citizens believe that they have equal influence? (7)

The PR model used in South Africa is a product of the negotiated settlement reached between the apartheid state and the former liberation movements during transition in the early to mid 1990s. The South African electoral regime has met with international and domestic approval because it initially addressed transitional issues. The PR system with no threshold mirrors the national and provincial electorate, thus ensuring that the national and provincial legislatures are broadly representative and afford a strong sense of inclusiveness for all under majority rule. Parties have closed lists in order to increase party identity and cohesion. In short, the electoral system was the perfect design for a divided society.¹⁷ At the time of the 1994 election, the creation of a single national district avoided the potentially volatile project of drawing borders within the country.¹⁸

The interim Constitution mandated that the final electoral system provide for, "in general, proportional representation".¹⁹ It also stated: "Provision shall be made for the participation of minority political parties in the legislative process in a manner consistent with democracy."²⁰ The result was the use of a 0.25 percent threshold to ensure that minority parties (read minority political views) were included in the legislature. The PR system design also ensures that all votes count towards determining how many seats each party receives. All votes are equal and none are wasted. Therefore since the first democratic elections, the electoral system has had a moderating effect on South Africa's politics due to the high level of inclusiveness, simplicity and fairness inherent in its design.

Previously, though, the issue of floor-crossing was seen as a limitation on this as it disrupted the absolute connection between volume of votes and volume of representation. Floor-crossing is a feature of PR systems which allow elected representatives defecting from one political party to another to retain their seats in the legislature,

despite the fact that those seats were won by their former party. Until 2000, floor-crossing in South Africa was prohibited by an “anti-defection” clause in the Constitution. Floor-crossing emerged in 2000 after the formation of the Democratic Alliance (DA), legislation was passed to deal with a merger between the Democratic Party (DP), the Federal Alliance (FA) and the New National Party (NNP).²¹

Floor-crossing undermined the electoral system in three ways. First, it disrupted or distorted proportionality as expressed by voters; second, it distorted the public financing of parties; and finally, it interrupted the internal functioning of political parties.²²

Ultimately, the floor-crossing system was to be short-lived as public opinion polls conducted in 2004 showed widespread public disapproval. By the time the IEC conducted its Multi-Stakeholder Conference in 2007, no party endorsed the process any longer, and at its national congress in Polokwane in December 2007 the ANC voted to do away with the process. A Bill was subsequently tabled in Parliament in 2008, and in January 2009 a constitutional amendment was passed prohibiting-floor crossing.²³

Notwithstanding the floor-crossing debacle, citizens have been generally positive about the influence of their votes. A 2006 survey conducted by the Human Sciences Research Council (HSRC) found that 89% of South Africans perceive the country's election process to be free and fair and two-thirds of respondents believed that the counting of ballot papers and reporting of votes was accurate during the last elections. Together with the increased turnout for the 2009 elections, this suggests that South Africans generally have faith in the fairness of the elections. Since the abolition of floor-crossing the electoral system has once again regained the integrity in terms of fairness and inclusiveness that was evident in the first years of democracy.

Open competition

18. Is there equal opportunity for all groups who wish to organise and stand for office? Does social grouping make a difference? (6)

The Constitution states that every citizen is free to make political choices, which explicitly includes the right to form a political party.²⁴ The Electoral Code of Conduct goes further in that it requires all political parties contesting elections to publicly sign the code and affirm that all citizens and parties have the right to freely express their opinions and political ideas.²⁵ Theoretically, therefore, the opportunity does exist, but in practice the costs of forming a party and of registering and running an election campaign often prove prohibitive. This is no surprise, as South Africa is a complex country in which to run a campaign. Challenges such as urban-rural divides and multiple languages require extensive logistical capacity and monetary resources.

However, these constraints on campaigning are not as prohibitive in relation to initial registration to contest an election. The high number of parties that contested the 2009 national and provincial elections indicates as much.

While the costs of registration may be minimal, campaigning costs remain high, which effectively restricts the capacity of the poor to organise and form political parties.²⁶ But this is a product of resource constraints, not of official restrictions preventing citizens from organising and standing for office. And it is here that the chasm between the poor and rich becomes apparent in terms of influence on the South African political landscape.

19. *Are all political parties able to campaign free of threat?* (7)
20. *Are all citizens free to form opinions, voice them, persuade others and vote, as they like, free of threat?* (8)
21. *How effective a range of choice does the electoral and party system allow the voters? Is there an open competition of ideas and policies?* (6)

The Constitution and the Electoral Act afford all citizens and political parties the right to campaign freely, and the IEC is responsible for ensuring that all parties adhere to the Electoral Code of Conduct. The IEC acts as a referee between the political parties, hearing complaints and disputes, and holding all parties to a generalised code of conduct. In order to assess the IEC's performance, one needs to look at the public's and party's acceptance of election results, which has so far been unwavering. But even the IEC admits that progress remains to be made towards a system free of electoral violence, with high voter registration and turnout, and more transparency. The tasks of the IEC are outlined in the Electoral Commission Act and include: the management of elections, ensuring that elections are free and fair, promoting knowledge of sound and democratic electoral processes, compiling and maintaining voters' rolls, maintaining a register of parties, promoting voter education and declaring the results of elections.²⁷

There were a few incidents of electoral violence and intimidation before the 2009 elections. The Electoral Code of Conduct for 2009 was signed by all participating parties on 12 February. It committed them to non-violence, among other measures designed to ensure a peaceful campaign. In addition, the IEC held a two-day seminar for the parties on tolerance. Opposition groups also held their own multi-party forum to assess where they saw obstructions to a free and fair election. One issue to emerge was that opposition parties in the Northern Cape – the DA, Cope, Freedom Front Plus (FF+) and the African Christian Democratic Party (ACDP) – argued that IEC employees in the province were biased towards the ANC. These claims were based on the conduct of IEC employees during by-elections.²⁸ The IEC met with all parties and eventually resolved the concerns.

The Electoral Code of Conduct also prohibits parties from holding rallies at the same place at the same time. The IEC usually tries to resolve inter-party disputes and complaints through internal mediation and by delivering rulings. If these decisions are appealed against, they are referred to the Electoral Court, which is independent of the IEC.²⁹

Nevertheless, Afrobarometer's 2008 survey suggests that citizens generally consider themselves free to campaign and organise politically.³⁰

Table 2.2: *Freedom of political activity*³¹

How free are citizens to: (%)			
	Say what they think	Join a political organisation	Vote without feeling pressured
Not at all free	9	7	8
Not very free	13	11	8
Somewhat free	28	20	21
Completely free	48	60	61
Don't know	1	2	2

Moreover, because the PR system treats all votes equally and allows none to be wasted, and because the cost of registering political parties is minimal, there is a wide range of choice on the South African electoral landscape. The inclusiveness of the PR system promotes multi-party democracy, and its low threshold gives small opposition parties a strong incentive to contest elections.

While there are no explicit restrictions on the ability of parties to compete openly, there are, as mentioned above, material limitations that can inhibit some parties from running effective publicity campaigns. Because South Africa has no regulation of party funding from private donors, a wealth gap has emerged between the ANC and the DA on one hand and smaller opposition parties on the other. Thus the political environment has become a more restricted space, especially for the poor, due to the influence of capital.

Election rules

22. *To what extent are voter registration procedures independent of control by government or individual political parties?* (8)
23. *To what extent are election procedures independent of control by government or individual political parties?* (8)
24. *To what extent are the advantages of incumbency regulated to prevent abuse in the conduct and contesting of elections?* (8)

According to the Constitution and the Electoral Act, voter registration procedures and election procedures are the sole responsibility of the IEC, although parties themselves lead voter registration drives. But the processes rely on the co-operation of various state departments. The Department of Home Affairs, for example, is required to provide bar-coded identity documents to allow the IEC's procedures to be followed.³² Nevertheless, the IEC's independence as an institution is critical to the freeness and fairness of the electoral system, and ultimately to its integrity.

The IEC is one of the institutions established in terms of Chapter 9 of the Constitution and is protected by section 181 of the Constitution. Conditions for the appointment of commissioners to the IEC are regulated by the Electoral Commission Act, which specifies that the commission must consist of five members, one of whom is a judge. The Act also stipulates that commissioners should not have a high party-political profile. This qualification is unique to the IEC and is not required in appointments to other Chapter 9 institutions.

In accordance with section 193 of the Constitution, the President of the Republic appoints commissioners upon the recommendation of the National Assembly. The Electoral Commission Act stipulates that these recommendations are made by a National Assembly committee proportionally composed of all parties, drawn from a list of no fewer than eight individuals recommended by a panel chaired by the President of the Constitutional Court and including representatives of the Human Rights Commission and the Commission on Gender Equality and the Public Protector.³³ The controls surrounding the composition of the IEC are another pillar of the independence of the electoral process.

The IEC's status as an independent institution and its increasingly competent performance since the first democratic election in 1994 serve to limit the potential for abuse by the government. As a result, elections have thus far been largely free of such abuse. But the lack of regulation of private party funding severely tarnishes this image in that, by virtue of its incumbency, the ruling party tends to receive the lion's share of resources from private donors. Smaller opposition parties cannot compete on an equal footing as they have very little political influence which they can use in exchange for resources.

25. *To what extent are voters able to register and to what extent have they registered to vote?* (7)
26. *Are election procedures free from abuse? And to what extent do citizens see election procedures as free from abuse?* (6)

According to the Electoral Act, the IEC is responsible for the management of a permanent common voters' roll. Much progress has been made in the establishment of that voters' roll, with the number of voting stations nearly doubled from 10,000 in 1994 to 19,726 in 2009,³⁴ and measures adopted to increase transparency and expediency.

Following the creation of an initial permanent voter's roll in 1999, 18 million South Africans were registered to vote. For the 2000 municipal elections an additional 300,000 people registered. In 2004, the IEC added approximately two million new voters to the roll, bringing the total to 20.7 million. The goal for 2009 was increasing the voters' roll to 22 million. After two highly successful registration weekends (8 and 9 November 2008, 7 and 8 February 2009), this target was met and surpassed with a figure in excess of 23 million.

The bulk of this increase came from new registrations among young people (aged 20-29). This was particularly significant because it corrected a historic disparity

between the young population and those registered to vote. The IEC reported the results to Parliament on 12 February, in accordance with its mandate: 78% of newly registered voters – a total of 828,201 – were in the “youth” category of South Africans (under 30 years of age), and of the 23.18 million registered voters on the roll in 2009, 17 919 966 voted.³⁵

Political engagement by young people has been increasing in recent elections worldwide. The change has been attributed to a generational shift in values and the use of new technologies by parties and candidates to reach voters. The IEC certainly made good use of the new technologies: voters could, for example, check their registration status by SMS. Additionally, helpful information about both registering and voting can be found online, providing more access to younger people, who use this form of communication more than any other group. Details of the registration process are easily available online on the IEC web site. Unfortunately this does not help the many South Africans who do not have access to the internet. Fortunately, other tools, including the very successful SMS registration check-up, were used and registration proved a fairly simple process, as evidenced by the significant growth in registration rates.³⁶

With regard to the challenge of access in rural areas, the IEC often uses mobile voting stations to ensure that the voting process is inclusive and effective. Mobile voting was legalised by the Electoral Act. Additional measures have been taken to address transportation issues, in a 2006 survey conducted by the HSRC, 85% of respondents indicated that they were able to access voting stations through the provision of free transportation.³⁷ However, constraints such as a lack of bar-coded identity documents prevent some people from voting, especially in remote rural areas. Furthermore, the HSRC study found that practical problems, such as time and money, are among the main reasons people choose not to vote.³⁸

In the Afrobarometer survey findings mentioned above, 72% of respondents thought the 2004 election was legitimate and fair and only 7% thought otherwise. This is evidence of a widely held view that the elections were free from abuse and that the IEC is a well-functioning, politically independent body.

Incidents of abuse of the election process have raised questions, but the swiftness with which the IEC dealt with irregularities maintained the integrity of the process. During the 2009 national and provincial elections, a handful of IEC officials were arrested for electoral irregularities. Allegations of misuse of state funds and resources to garner political support were made in the provinces of Limpopo, the Eastern Cape, Gauteng and the Western Cape. Of particular concern were reports that access to the social grants system had been used by members of political parties to solicit the support of voters in some areas.³⁹

However, South African elections have become increasingly free and fair since 1994. Much of this is due to the independence of the IEC and its performance under increasingly difficult conditions with regard to logistics and capacity – and in spite of persisting political intolerance in regions such as KwaZulu-Natal.

Voter information

27. *How much information is conveyed to voters by the official election information system?* (7)

Though voter education is usually carried out by the parties, the media and non-governmental organisations, the IEC does make some effort to contribute. The IEC website is a valuable source of procedural information, educating young voters and helping participation rates to grow. Unfortunately, South Africa's limited access to the internet means that a wider range of measures is required if the campaign is to have universal effect. To target those most in need of assistance, the IEC has extended its programmes to assist illiterate voters in casting their ballots. A particularly positive innovation was the creation of the SMS registration confirmation facility, which made the first step of the registration process relatively painless.

The independence of the IEC prevents it from commenting on particular parties and other qualitative issues surrounding the elections.

In order to vouch for the independence of providers of voter education, the IEC investigates the activity of such organisations and then decides whether to accredit them or not.

28. *How much information about political parties and candidates is conveyed by the news media? And how fairly is this done?* (5)
29. *How much access do political parties have to the media and how equitable is this?* (8)
30. *To what extent do the campaigns of political parties reach all sections of society?* (6)

The media's coverage of party policies has been somewhat inconsistent in depth and quality. There are concerns over the quality of coverage in terms of educating and informing the public about political parties. The Media Monitoring Africa (MMA) group expressed this concern after monitoring the information released by the print and broadcast media during the April 2009 elections. They found that the information released, though high in quantity, lacked quality, with one-sided, contradictory, personality-focused and sensational journalism as the key problems.

In terms of quantity of coverage, MMA indicated in its reporting on the 2009 elections that the ANC had received the bulk of media coverage. That led to a debate about whether this was an indication of media favouritism, particularly on the part of the South African Broadcasting Corporation (SABC).⁴⁰ However, it would seem that coverage of political parties was largely determined by their status on the political landscape.

What is of greater concern was whether media to a large extent was fulfilling its duty to hold political parties to account on behalf of citizens. MMA states that much of the media coverage was "events-focused" and on "newsworthy" items of internal

party politics and personal conflicts across parties. Coverage did not engage critically enough with party manifestos and policy issues.⁴¹

In terms of access to media for discussion of opposition parties' manifestos, the results have again been mixed. Aside from the frequent focus on personalised negative politics rather than party policy, as mentioned above, there were also several examples of meaningful media access for the parties, particularly on the radio. The SABC's radio stations were particularly successful in engaging the parties on key issues by running and broadcasting "town hall" style community meetings. These meetings offered parties a useful platform on which to posit and debate their policies.⁴²

Some concern has been expressed at the SABC's reliance on government funding, which implies a possible conflict of interest. There has been no concrete evidence of this having negative effects, but potential conflicts of interest did arise. However, this is perhaps largely a function of the lack of access to private broadcast media and the dominance of the public broadcaster.

The rise of web-based campaigning is a slight concern, given that internet access is limited for many South Africans. It needs to happen alongside other more traditional methods, given the schisms of South African society. However, party websites, blogs and social networks proved particularly successful in engaging the youth in the electoral process.

The fact that some sectors of society have greater access to information than others implies that the more isolated sectors are insufficiently informed. Radio has been a very successful tool for informing even the most isolated South Africans.

31. *Do voters know enough about all political parties to be able to make an informed choice?* (6)

Elections in South Africa have always captured the imagination of the public, and the media has always been a conduit for the release of large volumes of information. However, the quality of the information has not always matched its quantity, with the focus placed more on sensational aspects of the process, rather than on policy. This can make voters cynical about the electoral process and politics in general and perhaps lead to lower levels of participation by citizens.

But political parties have also played a role in this regard. Cherrel Africa argues that the negative campaigning by political parties creates "noise" through which voters are unable to pick up on important information cues. More importantly, the negative tone makes voters cynical towards the political process as well as voting. This is a trend that has emerged over the past few elections in South Africa and is definitely counterproductive in ensuring active citizen participation during elections.⁴³

In this regard parties need to take the lead. Political parties essentially compete in an electoral "market" and have to ensure that their politicking and criticism of other "brands" does not alienate the voters from the market itself – that is, from the democratic political process. South Africa is a participatory democracy and therefore

requires an engaged and active citizenry. Highly personalised politics and negative campaigning are bad for this level of participation by citizens. South Africa's media also have a responsibility towards the public to interrogate policy issues better and not to provide a platform for politicians to engage in negative campaigning and personality-driven politics.

Electoral participation

32. *How extensively do citizens participate in elections?* (8)

33. *How are citizens able to influence the electoral process in ways other than the vote?* (7)

Table 2.3: *National voting changes 2004-2009* ⁴⁴

	2004	2009	Absolute change	% increase in voters
Total registered voters	20 674 926	23 181 997	2 507 071	10.81
Total actual voters	15 863 558	17 919 966	2 056 408	11.48

After the 1994 elections, there was a decrease in voter turnout rates in 1999 and 2004. The figures achieved in the 2009 elections are good by international standards and are positive in African terms. The 11% growth in total voter turnout exceeds the population growth rate and, together with the growth of the youth vote, is even more encouraging.⁴⁵

Civil society's participation extends beyond mere voting. Civil society plays an active role in voter education and electoral monitoring. For example, the Election Monitoring Network (EMN), a coalition of civil society organisations, deployed monitors to ensure that elections remain free and fair. The IEC itself is made up of non-aligned civilians. Thus there is certainly a reasonable level of civil participation in the electoral process.

As discussed below, it is feared that business, private money or commercial interests play too prominent a role in the election process, through the influence-peddling associated with the unregulated donation of campaign funds.⁴⁶

34. *To what extent is the management and control of the elections delegated to an independent body?* (9)

Elections in South Africa have generally maintained a positive trend, and this includes the general elections in 2009. South Africa's modern Constitution has created an environment favourable to the holding of sound, free and fair elections. The key feature that has allowed the IEC to prosper is its status as a Chapter 9 institution.

The IEC has made efforts to:

- Maintain voter secrecy;
- Make sure all parties follow a general code of conduct;

- Ensure that all elections are free and fair;
- Promote knowledge of sound and democratic electoral processes;
- Compile and maintain voters' rolls;
- Maintain a register of parties;
- Promote voter education; and
- Declare the results of elections.

The IEC has received praise and approval both locally and internationally. The Southern African Development Community's Electoral Observer Mission (SEOM) is quoted as saying that "South Africa's fourth democratic elections took place in a peaceful atmosphere" and that "[t]he elections were fair, transparent and credible."⁴⁷

35. *Are there mechanisms for the review of the electoral system and are these open to citizen participation?* (5)

Electoral reform is the subject of ongoing debate in South Africa. The discussion has not ended, nor has consensus been reached. The first and only engagement by the government to discuss the issue was through the establishment of the Electoral Task Team (ETT).

The architects of the 1996 Constitution deferred the task of finalising South Africa's electoral system to a special task team which was to propose final arrangements to Parliament before the 2004 election. The Cabinet finally came round to appointing this group in 2002. It was chaired by a former opposition leader, Dr F van Zyl Slabbert, and included members of government and civil society. The process involved private deliberations, a survey of voter attitudes to the current electoral system commissioned from prominent political scientists Roger Southall of Rhodes University and Robert Mattes of the University of Cape Town, a multi-stakeholder conference and the consideration of submissions from a range of civil society groups.

The appointment of this group was the result of serious concerns about electoral reform and pressure from opposition parties and civil society groups for the issue to be addressed. For example, Bertha Chiroro argues that South Africa required electoral reform that elevated citizens' views above those of the ruling party so that the electorate played a stronger role in the election of MPs.⁴⁸ This would also ensure greater accountability between election periods, as constituents would have a direct link to their representatives in the national and provincial legislatures.

The task team identified fairness, simplicity and inclusiveness as positive aspects of the system they were examining and lack of accountability as its primary weakness. It was widely felt that any changes to the electoral system should not compromise its simplicity, because that might create confusion and possible problems with voter education and election administration. For example, the task team was concerned that an open-list system might confuse voters as they would then be required to choose not only a party but a candidate as well. The ETT also pondered whether an electoral system *per se* could induce accountability or whether that was primarily

the task of other institutional arrangements governing the behaviour of those holding public office, like the Chapter 9 institutions. Or was it both?

Ultimately, the ETT proposed a system that they felt would not change the electoral system so drastically as to completely disrupt the administration of the elections, and one that could be modified in the future to increase accountability. This system was supported by a majority of the team, although a minority did favour a dissenting proposal which was to maintain the status quo. The majority proposal was dubbed the '69 constituency option' and proposed expanding the number of multi-member constituencies in the country from the nine (*the existing provinces*) to 69. This means that 300 representatives of the legislature will be elected from constituencies and 100 from a closed list, in order to retain the proportionality feature enshrined in the constitutional principles in Schedule 4 of the 1993 Constitution.

The report was tabled in March 2003, but rather than consider it then, Parliament essentially adopted the minority position favoured by the Minister of Home Affairs at the time, Mangosuthu Buthelezi, and voted to retain the status quo for the 2004 elections and to revisit the recommendations after that contest – which, however, it never did.

One of the issues that engaged the ETT was the perceived large democratic deficit in accountability between legislators and their constituents. This situation remains unaddressed and citizens are likely to encounter similar challenges with regard to accountability and responsiveness during the term of the fourth democratic Parliament.

Electoral outcomes

- 36. *Are the announced election results congruent with how the electorate actually cast their ballots?* (8)
- 37. *Do citizens believe that their vote makes a difference?* (7)
- 38. *Do security forces, the government and political parties accept the election results?* (8)
- 39. *Do citizens accept the election results?* (8)

Since the first democratic election in 1994, concern over the fairness of election results has diminished. This can be attributed to the functioning of the IEC, the electoral system design and the public's trust in South Africa's electoral institutions. Processes exist for public challenges to electoral outcomes. Election results are not widely contested. The small number of appeals shows faith in both the integrity of the results and the independence of the IEC.

In the province of KwaZulu-Natal, however, election results have been a point of contention, but this has usually related to the electoral climate and the election campaign rather than the actual voting process and counting of ballots. In the April 2009 election, KwaZulu-Natal was the scene of fierce contestation between the Inkatha

Freedom Party (IFP) and the ANC. Incidents of violence during the campaign threatened to tarnish the election and its outcome. However, the IFP and ANC set up a joint conflict resolution mechanism which worked effectively, and levels of violence and intimidation fell dramatically in the weeks leading up to the election.

As mentioned above, opposition groups formed their own Multi-Party Forum, outside the IEC's processes, to assess perceived obstructions to a free and fair election.

After the elections, IFP leader Mangosuthu Buthelezi claimed electoral fraud, as he had done regarding all previous elections. The loss of IFP support in KwaZulu-Natal had been compounded, according to Buthelezi, by IEC biases and its inability to control violence in the IFP heartland of Nongoma. The IEC issued a press release condemning his public criticisms of the commission, and the matter did not threaten public acceptance of the results.

Public opinion surveys and the consistently high turnout rates indicate that there is widespread public acceptance of the electoral process and results. As for the security forces, since 1994 there has been no indication that the security forces are party political and therefore pose a threat to the outcome of any election, although this was a serious concern during the first democratic election. The government has always accepted election results. This may be attributed to the ANC's electoral dominance and incumbency. The longer-term concern may be whether, as the political landscape shifts and the ANC's electoral dominance faces greater challenges, government acceptance of election outcomes can be taken for granted.

40. *How closely do the composition of the legislatures and the selection of government reflect the election outcome?* (6)
41. *How far do the legislatures reflect the social composition of the electorate? To what extent are women represented in Parliament?* (7)

As discussed earlier in the section, the composition of the legislature is a near perfect reflection of the electoral outcome. The PR system with a minimal threshold ensures that every vote is counted and has equal value. Voters vote for a party, rather than for an individual. Each party participating in the election must provide a candidate list nominating party members to receive seats in a specific order. The seats in the National Assembly are assigned to parties according to the share of the vote each receives. The National Assembly elects the President at the first sitting of Parliament after an election. Once elected, the President is no longer a Member of Parliament and elects his/her executive from the members of the National Assembly (though two non-MPs can be included in the Cabinet). A similar process is followed at provincial level.

According to the 2008 Afrobarometer Survey, many South Africans would prefer a direct presidential election.⁴⁹ Under the current system, however, general elections seem to assume a "presidential" character", so party votes are cast with the presidential result strongly in mind. Therefore it is fair to say that there is very little scope for a divergence between the electorate's intentions and the ultimate identity of the president.⁵⁰

Strong strides have been made to increase gender-equality in Parliament. Altogether 45% of the members of the National Assembly are women, making South Africa's the world's third most equal parliament in gender terms. In 2009, five of the country's nine Provincial Premiers were women. The closed-party list system is often lauded by equality activists as a means of ensuring equitable representation. Lists can be socially engineered to be sensitive to the issue of gender representivity.

However, this is a function of party politics. No legislation exists to determine the level of representation of women in the legislature and it is only through the ANC's dominance in the legislature and its 50% gender quota that representation is so high. What a closed-list system does is to afford the opportunity to socially engineer lists, but this does not mean that such a system automatically translates into higher levels of gender representation. South Africa is a patriarchal society and perhaps if South Africa were to adopt a mixed-member system with a direct constituency election component, it may be unlikely that women would hold as many seats in the legislature as they currently do.

Funding elections

42. *To what extent are private donations to political parties permitted and are they subject to regulation (such as transparency and limits), in order to prevent them from having a disproportionate impact on voter choice and electoral outcome?* (3)
43. *Is campaign finance – both income and expenditure – regulated? Are the political parties regulated by accepted procedures and non-partisan bodies? How extensive is the independent oversight of election expenditure?* (3)
44. *Is there public financing of political parties?* (5)

South Africa has no legislation regulating the private funding of political parties. This means that private donors, including large corporates, can donate unlimited amounts of money to political parties without any requirement for openness and transparency. Two issues arise here. The first is that an unregulated environment exposes the political process to corruption, in the sense that private donors could be donating funds in order to influence politicians. This effectively undermines the interests and political influence of citizens. The second is the public's right to know. Voters cannot make informed decisions about where to place their electoral support if they are not aware of the sources and amounts of private funding to parties.

Moreover, an unregulated environment creates opportunities for corruption involving state institutions and state-owned enterprises, in which scarce resources are diverted to fund political parties. A few such cases have been exposed in recent years, confirming the need for regulation.⁵¹

There is thus a profound and increasingly urgent need to introduce greater transparency and equity into the private party funding environment. Recently large companies

in South Africa, after extensive pressure from civil society, decided to voluntarily disclose their private donations to political parties.⁵² Although this is welcome, it does not create sufficient transparency and openness. With regard to the Promotion of Access to Information Act 2 of 2000 (PAIA), Idasa has called on political parties to be more transparent about the sources of their political funding, for the reason that unregulated private funding creates an unbalanced multi-party system and allows unethical conduct.⁵³

South Africa is a difficult country in which to run an election campaign, with many logistical challenges, so campaigning successfully requires large resources. Yet private donations to political parties are unregulated, and parties are not required to disclose their campaign expenditure. There are no oversight mechanisms to monitor either expenditure or where campaign money comes from, and there is little or no independent oversight.

The South African Parliament allocates funds to political parties according to their share of seats. This is how 90% of public funding is distributed, and the remaining 10% is allocated equitably among all parties in the house. But Idasa's research has shown that political parties' election campaign expenditure far exceeds their share of public money under the Public Funding of Represented Political Parties Act.⁵⁴ The difference must, then, come from private donors.⁵⁵

Conclusion

South Africa's constitutional and legislative framework promotes regularly recurring free and fair elections, and since 1994 there have been four successful elections. The effective administration of these polls has been a hallmark of this democratic period, despite the often disturbing levels of political intolerance. Elections in South Africa have also seen a consistently high level of public participation as well as clear indications that the South African public trusts this democratic institution and the results it produces. The IEC has received much credit for this success, and the high voter registration rate for the April 2009 election testifies to it.

Moreover, the electoral system is characterised by the positive attributes of inclusiveness, fairness and simplicity. It serves a divided society such as South Africa's well by lending much-needed legitimacy to the democratic system as a whole.

But the electoral system, while functionally sound, has a structural weakness. Proportional representation with the closed party-list system makes the party as a whole accountable to the entire electorate, instead of making individual legislators accountable to their constituencies. Currently, legislators are accountable to party leaders. The flaw is that this limits the imperative for service delivery, as the elected representatives can ride on the coat-tails of their parties rather than being accountable individually. Now, more than ever, with rising levels of inequality and continued levels of poverty, South Africans require a more responsive and accountable government. In this regard, electoral reform would go a long way towards ensuring that

the electoral system produced legislatures that did not shun the public interest in favour of party interests.

But it is not only party interests to which the public interest is deferred in South African politics. The most obvious concern is the lack of regulation in regard to private party funding. The funds political parties receive from the state are considered insufficient to meet the expenses incurred in running an election campaign. Moreover, the public funding model serves to reinforce the inequities between political parties. Relationships between political parties and capital also remain unregulated, and this has created a space for corruption, in which political-business relationships characterised by patronage flourish.

South Africa needs governance that is responsive to the needs and interests of citizens – governance that is accountable to the citizens, first and foremost, rather than to political parties or big business. So far, elections have brought much-needed stability and legitimacy to the South African political landscape. But this important democratic institution requires reform and the regulation of private political funding in order for it to deliver more responsive and accountable governance that focuses on the citizens.

ENDNOTES

- 1 We would like to thank Professor Amanda Gouws for her comments on this chapter.
- 2 Constitution of the Republic of South Africa, 1996 [final Constitution], available at <http://www.info.gov.za/documents/constitution/1996/index.htm>.
- 3 Electoral Act 73 of 1998, available at http://www.elections.org.za/Documents/iec-a6_act.pdf.
- 4 We do not contend that this is true for the democracy as a whole, particularly between elections, but it does apply in elections, when the proportional representation system gives each vote equal weight.
- 5 Electoral Act 73 of 1998, available at http://www.elections.org.za/Documents/iec-a6_act.pdf.
- 6 Glenda Fick, 2005, "Elections and democracy: Is there free and fair selection of decision-makers?" in Richard Calland and Paul Graham, *Idasa's Democracy Index: Democracy in the Time of Mbeki*, Cape Town: Idasa, p. 49. Also see Murray Faure, 2007, "Election for Parliament and the Provinces in the New South Africa: 1994-2004", *African Journal of Political Science*, vol. 2, no. 1, pp. 70-88.
- 7 Constitution, 1996, section 19(3)(a). Available at: <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>
- 8 Electoral Act, 1998, section 38. Available at: <http://www.info.gov.za/gazette/acts/1998/act73-98.htm>
- 9 Constitution, 1996, section 19(3)(a).
- 10 Electoral Act, 1998.
- 11 Afrobarometer, 2008.
- 12 Afrobarometer, 2008.
- 13 Electoral Commission Act 51 of 1996, available at <http://www.info.gov.za/gazette/acts/1996/a51-96.htm>.
- 14 Roger Southall and Robert Mattes, 2002, "Popular attitudes towards the South African electoral system", in *Electoral Models for South Africa: Reflections and Options*, Johannesburg: Konrad-Adenauer-Stiftung, p. 84.
- 15 Judith February, 2009, "The electoral system and electoral administration", in Roger Southall and John Daniel (eds), *Zunami! The 2009 South African Elections*, Auckland Park: Jacana, p. 51.
- 16 This is important because, as it turned out, new and final electoral arrangements were not prescribed in the final Constitution. This delayed any decision on a permanent electoral process.
- 17 Arend Lijphardt, 1990, "Electoral systems, party systems, and conflict management in segmented societies", in Robert Schrire (ed), *Critical Choices for South Africa: An Agenda for the 1990s*, Cape Town: Oxford University Press.
- 18 Murray Faure, 1997, "Elections for parliament and the provinces in the new South Africa 1994-2004", *African Journal of Politics*, vol. 2, no. 1, pp. 70-88.
- 19 Constitution of the Republic of South Africa Act 200 of 1993 [Interim Constitution], Schedule 4,

- available at <http://www.info.gov.za/documents/constitution/93cons.htm>.
- 20 Interim Constitution, 1993, Schedule 4.
 - 21 The change enacted in 2000 allowed elected members of national, provincial or local legislatures to change party affiliations provided that those who chose to defect did not represent less than 10% of their party's total share of seats in the legislature and that the defection occurred only within a stipulated 15-day "window" period. This threshold effectively meant that parties with a larger share of seats in the legislature, like the ANC, had a distinct advantage as mass defection from them was never likely, whereas small political groupings, like the United Democratic Movement (UDM) at that time, were especially vulnerable. In short, defections were always more likely to occur from smaller to larger parties rather than the other way around.
 - 22 Interim Constitution, 1993, Schedule 4.
 - 23 The Constitution Fourteenth Amendment Act of 2008 and the Constitution Fifteenth Amendment Act of 2008, both gazetted on 9 January 2009.
 - 24 Constitution, 1996, section 19(1).
 - 25 Electoral Act, 1998, section 99, Schedule 2.
 - 26 The registration costs were as follows for the 2009 elections: registration fee, R500; deposit, R180 000 for national elections and R40 000 for provincial (to be returned if enough votes were gained to win a seat).
 - 27 Electoral Commission Act, 1996, section 5.
 - 28 SAPA, 2009a, "N Cape IEC is biased", 17 March 2009, available at <http://news.iafrica.com/sa/1340678.htm>.
 - 29 Judith February, 2009, pp. 61-62.
 - 30 Afrobarometer, 2008.
 - 31 Afrobarometer, 2008.
 - 32 The Constitutional Court's decision to uphold the law preventing expatriates from registering for the election in foreign territories could be seen as an example of Cabinet pressure influencing procedure. However, the court's decision was made on rational grounds in an unimpeded manner, as shown by its willingness to allow registered expatriates who had registered in South Africa to vote (*Mail & Guardian Online*, 2009, "DA: Vote ruling will change election result", 12 March, available at <http://www.mg.co.za/article/2009-03-12-iec-says-its-ready-for-overseas-voters>).
 - 33 Electoral Commission Act, section 6.
 - 34 IEC, 2008, *IEC Annual Report to Parliament*, Pretoria: Independent Electoral Commission.
 - 35 IEC, 2008.
 - 36 IEC, *The Registration Process*, available at <http://www.elections.org.za/electoral.asp?KSId=3&KId=2>; Jessica Bell, 2008, "IEC on voter registration drive", *Independent Online*, 27 October, available at http://www.iol.co.za/index.php?set_id=1&click_id=3086&art_id=vn20081027053855947C620664.
 - 37 Mbithi wa Kivilu, Yule Davids, Zakes Langa, Kealeboga Maphunye, Bongiwe Mncwango, Susan Sedumedi and Jare Struwig, 2006, "Survey on South African voter participation in elections", Human Sciences Research Council, available at <http://www.elections.org.za/papers/237/2006%20HSRC%20Final%20Report%20Summary%20on%20Voter%20Participation.doc>.
 - 38 Mbithi wa Kivilu, et al., 2006.
 - 39 EMN, 2009b, "Press statement", Election Monitoring Network, 20 April, available at http://www.idasa.org.za/Output_Details.asp?RID=1801&OTID=42&PID=75.
 - 40 Media Monitoring Africa, 2009a, "Is media campaigning for ANC and Cope?" 30 March, available at http://www.mediamonitoringafrica.org/index.php/resources/entry/2009_election_coverage_did_media_assist_citizens_in_making_an_inform/.
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ACCOUNTABILITY AND DEMOCRACY

BY GARY PIENAAR¹

Section 1 of the Constitution declares that accountability is one of South Africa's founding values. But what does accountability mean in a democracy?

Democratic accountability is based on the multi-dimensional notion of mutual obligations between free citizens who entrust to their elected government the exercise of significant power, provided they direct the resources and energies of the state to the promotion of the general good.² Whether or not a government achieves this broad objective, and the particular objectives of the political party in government, is subject to both continuous and periodic review. These reviews may include media scrutiny and public discussion, parliamentary oversight, court decisions and elections: institutions and processes that deliver an assessment of – that hold to account – a government, based on its performance. The value we place on the chosen objectives determines the severity of the consequences for failure to deliver the required outcomes.

Robert Behn,³ noting the complex character of democratic accountability, concludes that it usually means accountability for “one of three things: accountability for finances, ... fairness, or ... performance”. In pursuit of “government for [all] the people”, public officials are expected to “use money prudently and treat people fairly ... and accomplish public purposes”.⁴

Echoing the timeless insight that “power tends to corrupt, and absolute power corrupts absolutely”,⁵ Behn explains that democracies “worry” a great deal about accountability because we fear that public officials will abuse the power they wield on our behalf. Accountability is necessary because of human proclivities to indolence and error, and to be self-serving. We demand accountability from public officials in order to ensure that the central value of the democratic project – government of, by and for the people – is observed in practice.

Substantive or political uncertainty, a real apprehension of loss of power through democratic processes, remains a positive democratic value. Political leaders who feel

relatively more vulnerable to being replaced tend to conduct themselves in a manner more respectful of agreed objectives, rules and standards. Institutional uncertainty, however – “uncertainty about the rules of the game”⁶ – is a negative democratic value, as it implies vulnerability of the democratic system to undemocratic impulses. This is the subject matter of this section.

The section considers the vitality and adequacy of institutions designed to promote and ensure accountability, including the prescribed role and actual functioning of Parliament as a law-making and oversight body, including public access to and participation in its activities, access to the information essential to making accountability real, the adequacy of institutional mechanisms to ensure ethical performance of public responsibilities, and the independence of other oversight institutions such as the courts and the media. It also briefly looks at the government’s ability to influence its domestic policy environment.

A shift of domestic power from legislatures to the executive is a central theme in this assessment of recent South African experience, albeit with signs of a possible pushback. Whether new legislation recognising and enhancing Parliament’s status and role portends any real shift in the power balance, particularly in an unchanged pure proportional electoral system, will be the focus of much attention in the life of the fourth Parliament.⁷

We need to recognise the distinction between the procedural mechanisms discussed in this section and substantive outcomes; the existence of the former, however strong, does not automatically lead to democratically desirable outcomes. This remains true always – there are no guarantees in democracy: “The price of liberty is eternal vigilance.”⁸

Executive accountability and legislative oversight

45. *How far is the executive subject to the rule of law and transparent rules of government in the use of its powers? To what extent are all public officials subject to the rule of law and to transparent rules in the performance of their functions?* (4)

While the executive is the strongest branch of government, the Constitution provides a “firm legal and institutional anchor for the rule of law”.⁹ It entrenches constitutional sovereignty, protected by the courts, the separation of powers and the rule of law, accountability and transparency, and complemented by the obligations of co-operative government. The courts, as defenders of the Constitution, are required to be independent and subject only to the Constitution and the law.

Parliament is similarly subject to the rule of law and invested with oversight authority in respect of the executive branch of government, including in regard to public expenditure. The Public Finance Management Act (PFMA)¹⁰ is generally regarded as an effective oversight tool in Parliament’s hands in regard to the executive’s financial

probity. Further, the Auditor-General's reports on state compliance with that institution's requirements are generally seen as reliable, and Parliament's Standing Committee on Public Accounts (Scopa), customarily chaired by an opposition party member, is seen as an effective mechanism in this regard – though it is having to recover ground lost during the fallout from attempts to cover up the arms deal.

While the legal and institutional framework for good democratic governance in South Africa is thus largely in place, in practice gaps remain: for example, with regard to the transparency of political funding, the effectiveness of Parliament in holding the executive to account, and the integrity and impartiality of political institutions. No law regulates the private or foreign funding of political parties.¹¹ Parliament is elected in terms of a pure proportional representation (PR) list system,¹² which gives political parties extensive and virtually exclusive control over their delegates in Parliament, as Members of Parliament are not directly elected by or accountable to any defined constituency. The independence, integrity and efficacy in practice of constitutional institutions, state-owned enterprises and local government, have been questioned, due in significant part to the ANC's political dominance and its avowed policy of "deployment of loyal cadres".¹³

On the other hand, widespread concern regarding the undemocratic effects of floor-crossing legislation on the integrity of representative democracy has been recently resolved by a constitutional amendment to abolish it.¹⁴ Elected representatives are thus subject to greater accountability to their voters, even if only indirectly through their parties.

Executive power to amend the Constitution is constrained by the provisions of section 74 of the Constitution, with strict requirements to guard against arbitrary or frequent changes to the founding law. The Constitutional Court has held that the validity of a constitutional amendment (and any law) may be challenged in the courts, although such challenge is limited to the question of compliance with Constitutional procedures. The merit or advisability of the amendment falls within the exclusive remit of the elected representatives of citizens in Parliament, although direct citizen action, in the form of sometimes violent public protests, has arguably also played a part.¹⁵

The right of citizens to just and fair administrative treatment by the state is protected in section 33 of the Constitution, and the right of access to information, recognised globally for its instrumental utility to leverage the protection of other rights,¹⁶ is enshrined in the Constitution and national legislation.¹⁷

However, the draft State Liability Amendment Bill of 2009 and the Constitution Eighteenth Amendment Bill of 2009 signal an attempt to unduly limit state accountability by disallowing the attachment of state assets or property to satisfy unpaid judgment debts. Together, these Bills represent a failure to comply with the Constitutional Court's judgment in *Nyathi v MEC for Health, Gauteng*,¹⁸ which held that the provisions of the existing State Liability Act 20 of 1957 barring such attachment were unconstitutional.¹⁹

The constitutional principle of equality ensures that public officials can be held criminally responsible and civilly liable in their individual capacity for wrongful actions committed in their private and official capacity.²⁰ High Court and Constitutional Court jurisprudence reflects several instances of public officials and representatives being held accountable for their private and public conduct.²¹ An appropriate exception relates to privilege that attaches to elected representatives' freedom of speech in national and provincial Parliaments.²²

An ignoble exception to the principle of equality may be identified in the recent decision by the head of the National Prosecuting Authority (NPA) and acting National Director of Public Prosecutions (NDPP), Adv Mokotedi Mpshe, to withdraw all criminal charges arising from the arms deal²³ against then ANC presidential candidate Jacob Zuma. Mpshe occupied this position because of the controversial suspension and subsequent dismissal of Vusi Pikoli, who had been the NDPP.²⁴ A few weeks previously, Parliament had confirmed the President's decision to dismiss Pikoli despite a presidential inquiry finding that he was "fit and proper" to continue in his position.²⁵

The lawfulness of the indictment against Jacob Zuma was confirmed by the Supreme Court of Appeal in January 2009.²⁶ Mpshe nevertheless declined to allow a court to decide whether alleged misconduct by senior members of the NPA rendered the charges unlawful. Instead, on the basis of questionable authority and on grounds widely viewed as flimsy, he withdrew all charges against Zuma, a decision many consider to be unjustified and politically, rather than legally, motivated.²⁷

Members of the executive are also accountable for the ethical performance of their responsibilities in terms of the Executive Members' Ethics Act,²⁸ the Executive Code of Ethics and the Ministerial Handbook, which together require and promote transparency regarding financial interests, remuneration and benefits, with the objective of preventing conflicts of interest.

The additional question of executive "social accountability", or responsiveness to public sentiment, is posed by the example of the very generous ministerial vehicle allowance (regulated by the Ministerial Handbook). Cabinet members' enthusiastic exploitation of this benefit has generated widespread negative reaction²⁹ and the legitimate question of whether it is appropriate in a developing country where the vast majority still live in poverty, to approve a car allowance to ministers of over a million rands each. The ANC recognised the importance of such sensitivities when its 2007 *Strategy and Tactics* document exhorted "dissuasion against conspicuous consumption, ostentatiousness and corruption."³⁰ President Zuma's new Cabinet in 2009 showed no sensitivity to this policy position, with a flurry of highly publicised purchases of luxury ministerial cars that ran counter to the austerity measures propagated by the government to combat the global and local recession.

46. *How extensive and effective are the legislature's powers to scrutinise the executive, hold it to account, initiate and scrutinise as well as amend legislation between elections? Is the legislature able to hold the executive to account for the implementation of legislation and policy?* (4)

The legislative and oversight authority of Parliament is prescribed in the Constitution. Section 92 renders the executive “accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions”. They must give an account of their performance “in accordance with the Constitution and provide Parliament with full and regular reports concerning matters under their control”. The legislative independence and formal oversight authority of Parliament is extensive and in conformity with best practice internationally.³¹

Parliament is empowered to legislate the Budget and to exert oversight over public expenditure through Scopa and other committees, in terms of the performance standards and reporting obligations set out in the PFMA, *inter alia*. Parliament's constitutional power to amend the Budget has only recently been implemented.³²

While various mechanisms exist through which Parliament incorporates the principles of accountability, representivity and public participation, challenges remain in deepening and broadening those mechanisms. Section 42(3) of the Constitution provides that the National Assembly is elected to represent the people and to ensure “government by the people under the Constitution”, “yet at times it appears that there is a tenuous link between the national legislature and the people of South Africa.”³³

Broadly understood, Parliament has been effective in meeting its legislative responsibilities: discriminatory apartheid-era legislation has been virtually eradicated and legislation is continuously being modernised to keep pace with a fast-developing country. Parliament is increasingly prioritising its oversight responsibilities,³⁴ where its performance has been weaker. Political party allegiance and a lack of understanding, experience in oversight, capacity and research are often cited as limiting Parliament's oversight effectiveness.³⁵ In a pure proportional representation electoral system, its perceived subordination to the power of the party³⁶ has been reflected in its reluctance to challenge the executive on contentious issues, such as the arms deal and HIV/AIDS.

The New Partnership for Africa's Development (Nepad) African Peer Review Mechanism (APRM) process produced a report that led, in turn, to a report by the Independent Panel for the Assessment of Parliament (IP) and the parliamentary Oversight and Accountability Model (OAM).³⁷ Both identify weaknesses in Parliament's oversight performance and make detailed recommendations to ensure executive accountability to the legislature.³⁸

The years 2008 and 2009 have seen a more robust and assertive, and less deferential, attitude towards the executive.³⁹ Ministers and heads of department have experienced more animated scrutiny by MPs, including those from the ruling party.⁴⁰ Management failures have faced more overt criticism and declining tolerance of their repeated – and previously successful – mantra of public service “incapacity”. It remains to be seen, however, whether this assertion of authority will be “felt” by the executive and result in improved governance.

Improvements would include ensuring timely and adequately detailed answers by the executive to MPs' questions,⁴¹ which should be an important oversight tool, enabling

MPs to set the agenda for debate and discussion in Parliament rather than simply acquiesce in the executive's legislative programme. The efficacy of this mechanism is currently undermined by the significant backlog of unanswered questions, which has a negative impact on the "effectiveness and dignity of Parliament".

Moreover, Parliament could take more seriously its power to entertain legislation proposed by its Members. The few such pieces of legislation to have reached the statute book are mundane and parochial. Parliament should also develop an effective way to monitor the implementation and impact of legislation.⁴²

Despite these encouraging glimpses, however, the fourth Parliament has so far failed to exhibit the dynamism necessary to address its systemic weaknesses and to revitalise its proper role as a counterbalance to executive power.

47. To what extent has legislative and executive power been devolved and what impact has this had on popular control? (4)

South Africa has a "hybrid system of government based on a strong unitary framework."⁴³ The Constitution allocates legislative and executive powers concurrently to three spheres of government – national, provincial and local – which share similar competencies in law-making, oversight and implementation within their respective jurisdictions. They are "distinctive, interdependent and interrelated", a relationship regulated by the principles of co-operative governance, while national authority overrides provincial and local authority in cases of conflict.⁴⁴

The robustness of the system has not yet been tested by severe conflict, an unlikely prospect as long as the ANC holds the majority of seats in the national legislature and in all nine provincial legislatures. However, the election of the Democratic Alliance (DA), the official opposition party in the National Assembly, as the Western Cape government in the 2009 general elections increases the likelihood that the system will experience tension.

As reports have again surfaced that the ANC government plans either to abolish the provincial level of government or to radically reduce the number of provinces, possibly in order to strengthen local government,⁴⁵ the Constitution Seventeenth Amendment Bill, 2009, may herald a struggle between national and local authorities over its proposal to vest national government with new powers of intervention at local government level, ostensibly to facilitate service delivery by achieving regional efficiencies and economies of scale.⁴⁶

Lastly, while the pure PR electoral system constrains direct popular control at national and provincial levels, a mixed PR and constituency system for local government has led to many changes of power, but without a clear concomitant improvement in the quality of governance. Devolution of accountability through the constituency system at local level needs to be accompanied by significantly better party discipline and internal ethics management to be effective – and there has to be competent municipal management.⁴⁷

Public participation and accountability⁴⁸

48. *How open, accessible, extensive and systematic are the procedures/mechanisms for public consultation and participation on legislation and policy-making? How equal is the access which interest groups/citizens have to influence the law-making process?* (5⁴⁹)
55. *How accessible are elected representatives to members of the public? What impact does the electoral and party system have on the way in which MPs represent people?* (4⁵⁰)
49. *How open, accessible, extensive and systematic are the procedures/mechanisms for public consultation and participation on executive policy? And how equal is the access which citizens have to influence executive policy?* (5.5⁵¹)
50. *How far does government co-operate with relevant partners, associations and communities in forming and carrying out policies and how far are people able to participate in these processes?* (4)

Cooperative policy and lawmaking

Generally, executive policy may be influenced by way of written submissions responding to departmental invitations to the public to comment on proposed legislation and policy Green and White Papers. Occasional direct interaction between the executive and the electorate, in the form of *imbizos*, has left little impression.⁵²

Existing formal mechanisms in all spheres of government are based on the constitutional protection of openness, public participation and accountability.⁵³ A key challenge, as in most developing countries with relatively low literacy levels and limited access to modern communications technology, is implementation – that is, the effective reach of those mechanisms.⁵⁴ These limitations are compounded by the tenuous relationship between parliamentarians and the public. The effect is that public participation in governance is often formalistic and superficial, rarely going beyond the “cosmetic fulfillment of constitutional rights”, a “formality used merely to further an existing government agenda.”⁵⁵

While the government engages in social dialogue with various interlocutors and declaratively inclines to an inclusive approach to the policy-making process, co-operation with its flagship national consultative forum, the National Economic Development and Labour Council (Nedlac), has been erratic. Experience elsewhere echoes this trend. The poor working relationship between Nedlac and key government departments, as well as non-involvement in the policy-making cycle from conceptual to implementation stages, has led to a perception of Nedlac as “an irritation that must be avoided at any cost.”⁵⁶

Failure to achieve meaningful participation has, to some extent, been blamed on the impetus to achieve efficient service delivery, while discounting the means through which it is achieved. Judith February suggests that citizens have been excluded

from “key policy debates in the name of efficiency.”⁵⁷ Certainly, this “service delivery” approach conflicts with the “people-driven development” approach that emphasises popular participation in decision-making.⁵⁸ Successive Public Service Commission (PSC) reports⁵⁹ identify low levels of public participation, partly because official capacity to engage with the public is “sporadic and rudimentary”, with departments struggling to process and internalise public inputs. Understanding of the *Batho Pele* principle of consultation is narrow, with information dissemination seen as the primary form of consultation.

The Presidency’s 2008 report, *Towards A Fifteen Year Review*, criticises the “culture and orientation” of the public service, and weaknesses in the “interface between government and the public.” The consequences of these weaknesses are far-reaching and include dwindling citizen confidence in government and in the legitimacy of public institutions, prompting citizens to seek “less constructive mechanisms” to “express themselves and attract attention”, including escalating “service delivery” protests in recent years. Achieving meaningful public participation will require work from both citizens and government, and a return to the view that citizens are “co-creators”⁶⁰ of democracy, and not passive recipients of service delivery.⁶¹

Public Service director-general Richard Levin accepts government’s obligation, at least in regard to policy implementation: “[I]n a democratic society, the need to negotiate policy implementation with citizens’ groups never ends.”⁶²

Practical, and pragmatic, policy implementation is rarely a linear process; it requires sensitivity, and awareness of and responsiveness to emerging reality. A constant willingness to revisit and reconsider adopted policy is the hallmark of a government in touch with its electorate, prepared to both listen and lead.

In practice, however, we find a government that has remained immovable at various times on key issues such as HIV/AIDS, the arms deal, economic policy and the regulation of party funding. A determinative role regarding some aspects of public policy may be played by the unregulated relationship between the ruling party and its funders.⁶³ This is an iceberg afloat in the waters of public policy, the real extent and impact of which is hidden beneath the surface.

Accessibility of legislature and accountability of lawmakers

The National Assembly is elected to “represent the people and to ensure government by the people under the Constitution”.⁶⁴ It does this by choosing the President and by providing a national forum for public debate, legislating and scrutinising executive action.

The Constitution⁶⁵ prohibits Parliament from excluding the public or the media from the sittings of a committee “unless it is reasonable and justifiable to do so in an open

and democratic society". In practice, committees usually meet openly except where national security dictates otherwise.

Parliament is required to solicit public involvement in its "legislative and other processes", but a major complaint is that the ability of the public to contribute is largely determined by inequalities in access and it is possible for the government to ignore contributions. Since the Constitutional Court in *Matatiele* and *Doctors for Life*⁶⁶ asserted its authority over Parliament's exercise of its discretion concerning the extent and quality of public participation, public hearings are generally held where there is significant public interest in proposed legislation, for instance the nationwide hearings during 2008 on controversial legislation to dissolve the Scorpions,⁶⁷ which generated intense public interest and a large number of written and oral submissions.

One committee chairperson suggested that Parliament's responsibility was to approve the legislation, regardless of contrary views by the public. The prospect of Parliament abrogating its responsibility to apply its mind and represent the public, and to engage in a mere formality instead of facilitating meaningful public participation, generated a public outcry.⁶⁸ Extensive subsequent public hearings provided some reassurance regarding Parliament's fulfillment of its broader responsibilities.

Parliament's vision for 2004-2009 was to be a "People's Parliament",⁶⁹ but "significant challenges remain for Parliament to realise its vision",⁷⁰ specifically due to poor public understanding of parliamentary procedures and opportunities for participation. While South Africa does not have a constituency-based electoral system, "constituency" offices have been established and periods allocated for MPs to conduct "constituency" work,⁷¹ but the role that MPs play in their constituencies is not rigorously prescribed.⁷² The Independent Panel found it "unsatisfactory" that MPs were accountable to their parties for constituency work in which they represented Parliament as an institution,⁷³ and strongly recommended that Parliament review its ability to represent voters.⁷⁴

Lawmaking and the budget process

- 51 (a). *How extensive are the powers of legislative bodies?*
- (b). *How effective are they at legislating?* (6.5)
- 52. *How rigorous are the procedures for parliamentary approval, supervision of and input into the Budget and public expenditure?* (8)
- 53. *How much say does the public have in the development of the Budget?*
How well do parliamentary procedures allow the public to participate in decisions relating to resource allocation? (7)

Section 77(3) of the Constitution gives Parliament the power to amend money Bills, but requires enabling legislation to regulate the process. This is now available in the landmark Money Bills Amendment Procedure and Related Matters Act (Money

Bills Act) 9 of 2009, which provides a strong framework for Parliament's role in the Budget process.

Understood in terms of a bureaucratic model of success, Parliament has complied with its responsibility to publicly debate and legislate the Budget before the start of each financial year. Parliament also passed the PFMA, an effective, if indirect, budget expenditure management tool giving Parliament detailed and technically rigorous procedures for budget and expenditure approval and supervision through three parliamentary committees,⁷⁵ including Scopa, the National Assembly's Portfolio Committee on Finance and the Joint Budget Committee.⁷⁶

The limited number of submissions on the Budget over the years, however, reflects the value of public participation.⁷⁷ While budget hearings provided a forum for articulating citizen preferences, at least in regard to the medium-term priorities reflected in the medium-term expenditure framework, Parliament was unable to ensure their translation into budget priorities, contributing to the "image of Parliament as a rubber stamp ... undermining its credibility as a representative institution".⁷⁸

Scopa's reputation is slowly recovering after its experience during the arms deal demonstrated that political tension could render it susceptible to extreme pressure to serve the interests of the ruling party.⁷⁹ Debates in the finance committees and Joint Budget Committee are generally open and robust, and inputs by opposition parties are reflected in committee reports and in oversight-related engagement with government departments. However, capacity constraints mean that all committees struggle to evaluate performance thoroughly and lack clear mechanisms and the administrative capacity to ensure prosecution or the return of funds.

The national Budget provides a "comprehensive and reasonably accessible" sense of budget priorities and allocations, and the Division of Revenue Act "clearly indicates" the division of revenue between the three levels of government. The annual Estimates of National Expenditure provide detailed allocation information for all national departments and "has made significant progress in linking these allocations to so-called measurable objectives".⁸⁰

The Money Bills Act establishes "a clear sequence of decisions"⁸¹ and an independent parliamentary Budget office⁸² and gives Parliament "a high degree of control over budget execution",⁸³ says Wehner. Essentially, its power to amend the Budget is now unconstrained, although section 216 of the Constitution provides for legislation that establishes the National Treasury as ultimately responsible for the control of public finances, and the new Act retains a "top-down" procedure for budgetary decisions.⁸⁴ Ultimately, the Money Bills Act now provides better opportunities for interventions by citizens to meaningfully influence Budget priorities before they are fixed.

The exigencies of the electoral system suggest Parliament may remain the handmaiden of the executive and the party, but public influence may increase if Polokwane⁸⁵ has indeed "legitimised open contestation."⁸⁶ It is up to Parliament to claim the new space and make its voice heard as an equal in debate over national finances.

Access to information

- 54 (a) *How independent and accessible is public information about government policies and actions and their effects?*
 (b) *How comprehensive and effective is legislation giving citizens the right of access to government information?* (4)

Much information regarding government's policies and performance is available on official websites and at legislatures, and through public and private television and radio coverage. In the absence of official records of most parliamentary proceedings, the principal source of information about government legislation and performance⁸⁷ widely relied on by both public and MPs is the website of the (partly subscriber-accessed) independent non-governmental organisation, the Parliamentary Monitoring Group (PMG).⁸⁸

South Africa has a wide range of news media, including public and privately owned television, radio, print and other media. Although internet access is limited to a relatively small section of the population, it is increasingly available at public libraries. Most South Africans (mainly due to low literacy levels and limited disposable income), however, rely on radio and television for news about the government's activities and performance.⁸⁹

Consequently, control of the South African Broadcasting Corporation (SABC), the state-owned source of news and current affairs information for most South Africans, is an important and highly contentious matter. Is it a "state" or a "public" broadcaster? The controversial Broadcasting Amendment Act 4 of 2009, permits Parliament to remove the SABC board. It already has the authority to recommend board nominees to the President. Early in the term of the fourth Parliament, the board members who had not already resigned were removed by the National Assembly and replaced by a board not broadly accepted by all political parties.

Generally, however, the media are free to report on government policies, decisions and actions.⁹⁰ Media owners and distribution groups do not encourage self-censorship and there is a relatively strong investigative culture.⁹¹ Occasional lawsuits from politicians for libel and breach of privacy necessitate a degree of caution.⁹² President Jacob Zuma has begun litigation against award-winning cartoonist Zapiro and launched the country's largest defamation claim against newspapers for their reporting of his rape trial.⁹³

The government sometimes responds strongly to media reports of corruption, and has threatened the *Sunday Times* with a government advertising boycott.⁹⁴ A spate of pre-publication court interdicts against the publication of damaging allegations has been recently curtailed,⁹⁵ strengthening press freedom.

Section 32(1)(a) of the Constitution stipulates that "everyone has the right of access to any information held by the state". The Promotion of Access to Information Act, 2 of 2000 (PAIA) and the 2002 amending Act give effect to a broad right to information

with limited exceptions and without the necessity of giving reasons for requesting publicly held information. The law “is widely admired internationally for its far-reaching and unique coverage” of information held by private sector entities and individuals, from whom information may be obtained when it is “necessary to protect or exercise another right”.⁹⁶

The right of access to government information is further strengthened by section 195(1)(g) of the Constitution, which requires that public administration be governed by the principles of openness and transparency in order to provide the public with “timely, accessible and accurate information”.

Access to information mechanisms are available at reasonable cost, with exemption from payment for poorer citizens, although substantial administrative challenges remain.⁹⁷ A defensive and closed official culture that post-apartheid transformation under Mbeki failed to dilute, means government bodies generally take a long time to respond to requests, if they respond at all.⁹⁸ In the absence of either a willingness by public servants to promote a culture of openness or measures to punish obstruction, enforcement mechanisms are costly and time-consuming.⁹⁹ However, a recent Constitutional Court decision has removed legal costs as a barrier to litigation in efforts to enforce such requests for the general public benefit.¹⁰⁰

56. *How far are MPs protected from undue influence by outside interests?*

Are potential conflicts of interest [effectively] regulated? (4)

MPs’ powers and responsibilities, and the conduct of their duties, are described in the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act 4 of 2004 (Powers and Privileges Act), and the Joint Rules of Parliament adopted in terms of section 57 of the Constitution. Their independence is protected by section 58 of the Constitution, which allows certain privileges fundamental to representative democracy, notably freedom of speech in Parliament. Section 8 of the Act also prohibits improper influence on Members in the performance of their duties, and forbids Members from accepting any undue benefits in exchange for the performance of their duties.

MPs are collectively accountable for their official actions and decisions. Legislation therefore can be (and has been¹⁰¹) reviewed by the courts. As all citizens are equal before the law, MPs are individually accountable in their personal capacity in terms of the criminal and civil law, and they are accountable to Parliament in terms of the Members’ Code of Conduct,¹⁰² which includes a number of progressive features promoting transparency and accountability, focused on preventing conflicts of interest. While the Code¹⁰³ allows Parliament to reprimand, fine and temporarily suspend Members, appropriately, to prevent the abuse of political majorities, only a Member’s party may remove them if their criminal sentence does not exceed the threshold in section 47 of the Constitution of 12 months’ imprisonment without the option of a fine.

A prominent example is Tony Yengeni, who, when ANC Chief Whip in Parliament, was convicted of fraud relating to the government’s arms procurement package after

failing to disclose to Parliament that he had received a significant discount on the purchase price of a motor vehicle from one of the contractors. He was found guilty of contravening the Code, but, although rebuked by the Joint Committee on Ethics and Members' Interests, he was forced to resign his seat only after pressure from his party leadership.

Similarly, several MPs convicted of defrauding Parliament in the "Travelgate" scandal, having abused official travel vouchers, concluded plea bargains with the NPA, admitting guilt in exchange for a sentence not exceeding 12 months' imprisonment, allowing them to retain their seats. Some were publicly reprimanded by the Speaker, but their parties have – decisively – not disciplined them further by removing them as MPs.¹⁰⁴

The accountability gap inherent in the high threshold in section 47, and the greater power of political parties and the executive relative to Parliament, is exemplified by the recent re-election of Winnie Madikizela-Mandela as an MP, despite her criminal convictions for offences involving violence and dishonesty.¹⁰⁵

The repeated damage inflicted on Parliament's reputation by unethical conduct led the Independent Panel to suggest changing the existing constitutional rule so that any member convicted of corruption, fraud or a similar offence should be ineligible to serve as an MP.¹⁰⁶

Other weaknesses affecting the Members' Code of Conduct¹⁰⁷ include discretionary provisions in the rules limiting the transparency of the proceedings of the Joint Committee on Ethics and Members' Interests to the extent that accurate assessment of the rigour of the Committee's inquiries and the fairness of its sanctions is compromised. Echoing the Committee's own recommendation shortly after the Executive Members' Ethics Code was promulgated in 2000, the Independent Panel recommended¹⁰⁸ prioritising the revision of the parliamentary code to emulate the higher standards in the other code.

The Money Bills Act gives Parliament broad powers to amend the Budget. This may, for the first time, expose Members to pressure from interest groups and their lobbyists. Although the Powers and Privileges Act prohibits undue influencing of members, it contains no control measures. MPs should, at least, like members of the executive and of the public service engaged in procurement, be required to seek prior permission from the Speaker to retain gifts, hospitality and other benefits. Their greater responsibilities require that they should also be prohibited from engaging in outside remunerative activities, rather than, as now, simply being required to seek permission from their party to do so. Elected and unelected representatives should place their financial interests at arms length – for example, under independent administration, such as in a blind trust.

57. How effective is the separation of public office, elected and unelected, from party advantage and the personal, business and family interests of office holders? (4)

The Constitution, legislation and codes of conduct have repeatedly proved ineffective in prohibiting conduct that may compromise the credibility or integrity of public office.¹⁰⁹

A recent prominent example demonstrates the inadequacy of the general nature of the guidance offered by the Executive Members' Code of Ethics, with its considerable room for the exercise of discretion by the President (and premiers) to decide whether a gift constitutes a risk of a conflict of interest that should be avoided. In May 2009 gifts of substantial value, including a top-of-the-range Mercedes Benz motor vehicle, were given by a KwaZulu-Natal business association to the new Minister of Transport, S'bu Ndebele. The gift was said to be in appreciation for Ndebele's "support" for the association, including the awarding of several public contracts, while he was premier of that province.

Newly elected President Zuma failed to insist that the gifts be returned, indicating merely that the Minister had adequately complied with the law by declaring the gifts and obtaining his permission to keep them. Ndebele did subsequently return them, without reference to the provisions of the law, and ostensibly because the media scrutiny was bothering his family.

The reasonable perception that the gifts were an inappropriate consideration in exchange for the performance of a public duty, and with the possibility that future business opportunities for the association might arise in the new Minister's department, appear not to have been appreciated.¹¹⁰ The President's decision reflected a failure to recognise the fundamental intention behind the MPs' and Executive Members' codes – that is, to avoid even the possibility of a perception of conflict of interest – and missed an ideal opportunity to signal government's commitment to the standards of the Executive Members' Code of Ethics.¹¹¹

Some MPs who have failed to disclose their interests have faced sanction, while other allegations of non-disclosure found to have technical merit are said not to have given rise to a conflict of interests.¹¹² At times, MPs seem both uncertain about what needs to be disclosed and unable to keep track of all their outside interests. The effect is to contribute to the suspicion that MPs are at least unable to manage their complex private business interests, and equally unable to fulfil their primary public responsibilities of representation and oversight.

Recognised weaknesses in the ethics architecture and its implementation include enforcement mechanisms.¹¹³ Numerous investigations and inquiries have resulted in recommendations for improvements.¹¹⁴ Little has come of them, however.

One obvious omission in all the ethics codes is any mention of post-employment restrictions, or "cooling-off" periods, after leaving public office,¹¹⁵ an issue that has

generated controversy at least from the time of the Joint Investigating Team's report on the arms deal. Post-employment restrictions are designed to ensure that public officials derive no unfair advantage for themselves or for others from:

- The confidential information to which they have access while holding public office;
- Using their current positions to secure future personal advantage; or
- Their former association with government.

Tighter regulations should include measures to ensure that employees may not, by resignation or other forms of termination of employment, escape either the consequences of their actions or the prohibitions.¹¹⁶

Another area of significant concern is the poor level of compliance in the public service with both interest and gift disclosure requirements, and with the obligation to obtain prior permission for outside remunerative activities. The Auditor-General, the PSC, the Public Protector and the Special Investigating Unit have each issued reports¹¹⁷ recording numerous instances of non-compliance with the requirements intended to identify and prevent conflicts of interest, and subsequent failure to discipline identified offenders. The extent of the problem has generated widespread distrust of the integrity of state procurement.¹¹⁸ The Public Protector has recommended that "the conducting of business between government institutions and public entities and political parties should be regulated by legislation".¹¹⁹

There is mounting evidence that, despite these ethics regulations, and criminal sanctions in the Prevention and Combating of Corrupt Activities Act 12 of 2004, for dishonest and collusive tender practices, the government excessively favours tenders from private businesses with strong ties to the ANC, leading to a reliable flow of funding from these private companies to the party.¹²⁰ Under cover of otherwise legitimate and laudable legislation to promote broad-based black economic empowerment (BEE) among previously disadvantaged businesses, a repeatedly empowered narrow elite has emerged.

Calland encapsulates the concern: "The line between what is 'public' and what is 'private' is blurred or obscured and thus the abuse of public office for personal gain is a routine occurrence."¹²¹

That the ANC recognises the ethical and governance problems created by party members' and representatives' business activities was conceded in a recent statement by businessman and senior ANC leader Cyril Ramaphosa, who said that the ruling party had to "take a stand" against the culture of corruption.¹²² At least one new minister in Jacob Zuma's Cabinet, Tokyo Sexwale, undertook to resign all directorships while in office.¹²³

For the reported 42% of Cabinet members who have (currently permissible) private business involvement, Sexwale's is an example worth following, provided it also means that real distance – perhaps in the form of blind trusts to manage politicians' and public servants' business interests – is ensured from the turbulent and mud-died confluence of the streams of public and technically lawful private endeavour.

In practice, it has repeatedly proven quite difficult for many public officials to maintain clear daylight between their public duties and their private business interests. A much-needed de-escalation of the resulting high levels of mistrust would benefit from a requirement that at least senior public decision-makers temporarily relinquish direct control over private investment decisions that may create a real risk of conflicts of interest with their complex and varied public duties. A simple alternative solution could be to require complete divestment of outside interests while in office, perhaps compensated by higher remuneration, partly deferred.

The self-interested practice of round-tripping public funds is made possible by the absence of any public regulation of private funding of political parties, leaving a gaping hole in our knowledge of the extent to which the government may or may not be using its powers in the general public interest.¹²⁴ Despite repeated public undertakings to regulate the intersection between money and power,¹²⁵ ANC treasurer-general Mathews Phosa has said that there will be no law forcing political parties to disclose their funding until they are entitled to “sufficient” levels of public funding.¹²⁶ The obvious questions arise: how much is “sufficient”, and where will the resources come from in recessionary times?

Finally, the public role of party officials in a political system dominated by the executive and the ruling party carries a concomitant responsibility on parties to manage their representatives’ private conduct.¹²⁷ The Carl Niehaus affair exemplifies the consequences for parties themselves of their failure to seriously confront the issue of internal integrity management.¹²⁸

58. How independent are the judiciary and the courts from the executive and from all kinds of interference? (5)

Judicial independence is guaranteed by section 165 of the Constitution,¹²⁹ which prescribes that, consistent with the constitutional recognition of a separation of powers, the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No one may “interfere” with the functioning of the courts.

Judicial office tenure is protected by section 177 of the Constitution; removal is in closely prescribed circumstances and on limited, generally acceptable, grounds. The judiciary has maintained its independence while improving representivity.¹³⁰

Section 178(1) of the Constitution establishes a Judicial Service Commission (JSC) representing the legal profession, Parliament and government. The Judicial Service Commission Act 9 of 1994, provides for it to advise the executive on the appointment of judges, and to investigate and adjudicate alleged misconduct.

Judicial accountability is promoted by the requirement that decisions must be reasoned, which they generally are,¹³¹ while section 166 provides that court decisions are subject to appeal and review. Judges are personally accountable for breaches of

the law in their private capacity, in line with the constitutional principle of equality before the law.

Until recently, only an informal, voluntary code of ethical conduct existed for judges, with discretionary discipline by the JSC, often in consultation with the judges president of the divisions of the various courts and always in secret.¹³² There was no detailed guidance on how it should deal with misconduct where impeachment was not warranted. In spite of serious misconduct complaints in recent years, no judge has ever been impeached.¹³³

The Judicial Service Commission Amendment Act 20 of 2008, however, gives the JSC responsibility for judicial conduct and ethics, and includes detailed procedures for a complaints mechanism and for disciplinary action in response to both non-impeachable and impeachable offences. The Act envisages a detailed code of conduct to be developed by the judiciary and the executive, and passed by Parliament, dealing with gifts, financial interest disclosures and post-employment restrictions.¹³⁴ The legislation will hopefully help address the relatively poor perceptions of judicial integrity.¹³⁵

The efficiency and capacity of the justice system also pose challenges. Although the budget of the Department of Justice and Constitutional Development is steadily increasing, and finalisation and conviction rates are improving, there are still numerous complaints of inadequate technology and facilities and poorly-trained staff. The quality of prosecutors, judges and magistrates has also been questioned by the Department.¹³⁶

The appointment process of judges, regulated in some detail by section 174 of the Constitution, is not entirely transparent,¹³⁷ as members of the JSC (including those appointed by the government) can nominate their own candidates after nominations have closed. Moreover, the President need not provide reasons for declining to appoint candidates recommended by the JSC.

Concern over the application of the constitutionally mandated requirement (section 174(2)) for racial and gender representivity to redress historical imbalances was revived¹³⁸ when new Justice Minister Jeff Radebe unexpectedly insisted on suspending the JSC's 2009 appointment proceedings for the Appeal and High Courts,¹³⁹ which was widely interpreted as signalling that the proposed interview shortlist was unacceptable to the government. Radebe also informed Parliament of his intention to reintroduce the controversial Superior Courts Bill, which would dilute judicial autonomy, including administrative control of the courts. It is also difficult to ignore the political significance of President Zuma's decision to prefer Constitutional Court Justice Sandile Ngcobo over Deputy Chief Justice Dikgang Moseneke as the new Chief Justice, after the latter perhaps too pointedly asserted his independence from the ruling party.¹⁴⁰ While no irregularity occurred in either instance, these examples indicate that the judiciary is not impervious to executive manipulation, which may be exerted within legitimate processes.

Concern had been heightened by the criminal charges brought by the NPA against Jacob Zuma arising from the arms deal. After Zuma was appointed ANC president

at Polokwane, and as the courts continued to uphold the lawfulness of the NPA's persistence in arraigning him on these charges, his supporters questioned the integrity of the judiciary, and some threatened their physical safety.

Court rulings against Zuma were excoriated as "counter-revolutionary" actions by "reactionary" and "racist" judges. Zuma was cast as "under attack" from the judiciary. The ANC Youth League accused the NPA (described by the courts as their vital adjunct) of misusing state resources to "victimise" an "innocent" Jacob Zuma in a "relentless pursuit of an innocent man".¹⁴¹ The ANC, belatedly and apparently reluctantly, decried its members' attacks on judicial integrity, independence and safety. Zuma was silent on the threats.

Such was the level of distress during the battle over the independence of the judiciary that, after threats reached a peak in mid 2008, civil society felt constrained to issue a "declaration in defence of the Constitution".¹⁴² The Declaration, signed and supported by senior civil society leaders, denounced the threats and their dangerous implications for constitutional democracy. Soon after, the ANC leadership began issuing statements expressing concern at the threats, but denying responsibility for them. The threats became less direct and more implicit, but continued after the Supreme Court of Appeal confirmed in January 2009 that Zuma should face the charges at trial.

While this battle raged, Parliament's endorsement of President Kgalema Motlanthe's dismissal of NDPP Vusi Pikoli for refusing to comply with former President Mbeki's instruction¹⁴³ to delay the arrest of the National Commissioner of Police appeared to intensify the challenge to the independence of the judiciary and its right hand in criminal matters, the NPA. The Acting NDPP's weakly reasoned decision¹⁴⁴ to withdraw charges against Zuma, rather than allow a court to rule on the matter, was seen as consistent with the sustained pressure on the judiciary.¹⁴⁵ Zuma increased the pressure when, in response, he called for "checks and balances" to enhance Parliament's oversight of the judiciary.¹⁴⁶

Persistent misgivings over the ANC's real attitude towards the bench elicited assertions by the Chief Justice¹⁴⁷ that the judiciary was committed to respecting the principle of separation of powers, the continuing transformation of the judiciary and upholding the principles of accountability, responsiveness and openness. The judiciary also welcomed the public commitment of the executive to the independence of the judiciary and its willingness to support the judiciary in the fulfilment of its constitutional obligations¹⁴⁸ after President Zuma was prompted to reassure a judges' conference that the separation of powers was secure and would be defended.

Nonetheless, in several highly sensitive matters,¹⁴⁹ the executive and the legislature have proven responsive, for the most part, even to unfavourable court decisions, with the possible recent exception of draft legislation that ignores the Constitutional Court ruling in *Nyathi*,¹⁵⁰ and disturbingly proposes to insulate the new provision from future legal scrutiny.¹⁵¹

59 How effective and open to scrutiny is the control exercised by the legislature and the executive over civil servants? (5)

The Constitution requires that the national legislature's oversight of the executive and public servants be conducted in an open and transparent manner, and Parliament is given the necessary powers to enable it to do so,¹⁵² with limited exceptions relating to security. The media is free to report proceedings in the legislature, and does so. Most important issues receive media coverage, although detailed reports are often limited to those with access to a partly subscriber-based internet service.¹⁵³ The efficacy of the legislature's and executive's oversight and control is showing signs of greater robustness.¹⁵⁴

Public service performance is measured against the provisions of section 195 of the Constitution, which sets out the fundamental values and principles governing public administration, including a developmental orientation, fairness, efficiency and transparency, and which must be promoted by an independent and impartial PSC established in terms of section 196. Like other state departments and public bodies, the PSC is accountable to the National Assembly, to which it must report at least annually on its supervision of civil servants and its promotion of these values and principles, which it must undertake by investigating, monitoring and evaluating the organisation and administration, efficiency, ethics and personnel practices, such as performance management, of the public service.

The ANC's policy of actively promoting "cadre deployment" has been criticised for contravening these standards. President Jacob Zuma has, however, been reported as saying that his government will not blithely offer "jobs for pals".¹⁵⁵ The PSC's reports are the best available measurement of public service professionalism, albeit an indirect measure of political interference. PSC reports on public service compliance with the constitutional imperative that public services must be provided impartially, fairly, equitably and without bias indicate an overall compliance rate of only 50%.¹⁵⁶

While the transparency of the public service framework is generally commendable, its efficacy depends primarily on two factors, both of which are open to question: firstly, its capacity to perform its functions, and, secondly, the rigour with which Parliament exercises its oversight responsibilities. The PSC's "capacity to fulfil its mandate is severely tested."¹⁵⁷ Further, in common with other Chapter 9 institutions, its public reports and recommendations have not always been vigorously interrogated and examined, or their implementation monitored, by Parliament.¹⁵⁸

Ultimately, political appetite has a decisive influence on public servants' performance. Whether Scopa's more assertive recent stance finds expression in practical improvements both in public servants' performance and in service delivery as experienced by the public remains to be seen. Although former President Thabo Mbeki became known as "Mr Delivery" for his public commitments to improving service delivery, and his various delivery programmes and indicators,¹⁵⁹ his administration simultaneously developed a reputation for clinging to "collective responsibility" as a device to avoid direct individual culpability for poor performance.¹⁶⁰ A prime example

was his refusal to hold anyone – least of all anyone in his Cabinet and among their hand-picked heads of department – directly accountable for years of wrong-headed decisions to underinvest in Eskom’s electricity generation capacity, which resulted in damaging power cuts in early 2008.

President Zuma appears to have recognised the depth of public concern at the disjuncture between these declarations and delivery by appointing a Minister in the Presidency responsible for performance monitoring and evaluation to improve service delivery capacity, and to hold the executive and public servants accountable for their performance.¹⁶¹ However, the language used to describe this initiative says little new about executive accountability or the executive’s willingness to hold its officials responsible, the emphasis being on enhancing capacity and resolving “blockages”.

- 60.** *How far is the influence of powerful corporations and business interests over public policy kept in check, and how free are they from involvement in corruption?* (4)

As mentioned earlier, the overriding concern for public policy integrity in South Africa is the unknown extent and influence of private and foreign funding of political parties. In the absence of any regulation, the actual influence of powerful business interests and foreign political interests on the content of public policy remains uncertain.¹⁶² Public funding of political parties is limited¹⁶³ and is unlikely to cover the real costs of running a modern political party, especially during a general election.

Until the extent of such influence is rendered transparent, a cautious – even sceptical – approach is justified, especially in view of regular reports of the close relationships between the ANC and several wealthy businessmen¹⁶⁴ and foreign governments. The ANC openly acknowledged the link between the country’s China-friendly policies and its willingness to depart from existing public policy to deny the Dalai Lama a visa during the 2009 general election campaign. It was speculated that the real reason was the financial support for the ANC from the Chinese Communist Party.¹⁶⁵ It is perhaps similarly an open question whether other political parties’ policy positions are always a function of principled commitment.

Powerful business interests, particularly possible collusive and anti-competitive business practices harmful to consumers, and suspected of undermining the government’s pro-poor policies, have come under the spotlight in a series of Competition Commission investigations into alleged bread, milk and fertiliser price-fixing.¹⁶⁶

Private sector involvement in corruption is perceived to be relatively low,¹⁶⁷ although the need for more or less overt bribe-paying is perhaps reduced when a high degree of political sympathy is felt by public servants.¹⁶⁸

- 61.** *To what extent is the public service protected from corrupt practices? To what extent are public officials protected from undue influence by outside interests? Are potential conflicts of interest regulated?* (4)

While a relatively extensive ethics regulatory framework does exist,¹⁶⁹ it is incomplete in significant respects¹⁷⁰ and is proving increasingly ineffective in practice,¹⁷¹ largely because a lack of political will by Parliament's political masters means that no firm enforcement action has been required of the administration.

Although public experiences of public service corruption record few personal encounters with dishonesty,¹⁷² the detailed legal framework¹⁷³ has proven to be ineffective, as recent evidence to Scopa has once again highlighted.¹⁷⁴ Large numbers of senior public servants simply disregard the requirements of the law, and some actively refuse to comply with annual financial interest disclosure requirements. SCOPA is making stern noises about holding the executive senior management accountable for tightening up both regulatory gaps and implementation.

62. *Are public servants who blow the whistle on corruption encouraged and protected? Are citizens who blow the whistle on corruption protected?* (4)

The Public Service Code of Conduct¹⁷⁵ requires that “in the course of his/her official duties, an employee shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest”. This is reinforced by the provisions of section 34 of the Prevention and Combating of Corrupt Activities Act, 2004, which imposes a statutory duty in anyone in a “position of authority” to report suspected corrupt activities or conflicts of interest.

The Protected Disclosures Act 26 of 2000, protects all employees in the public (and private) sector from “occupational detriment” as a result of disclosing information relating to suspected or alleged criminal or other irregular conduct in the workplace, failure to comply with a legal obligation, miscarriages of justice, danger to the health or safety of an individual, environmental damage or unfair discrimination.¹⁷⁶ The Act details how concerns should be reported and provides for legally enforceable remedies for “occupational detriment”.

Weaknesses in the Act include the absence of an obligation to protect a whistleblower's identity or respect the confidentiality of a whistleblower's report. Nor does the Act protect a whistleblower against litigation for alleged defamation. The maximum compensation of 24 months' salary is low, particularly given the expense of protracted legal proceedings, the fact that the protections in the Act must be pursued at the whistleblower's own expense and the reality of unjustified negative perceptions by potential employers and the community.

The PSC encourages whistleblowing and operates a National Anti-Corruption Hotline which allows and protects anonymity. In practice, however, civil servants who report cases of corruption, graft, abuse of power or abuse of resources are not always protected from recrimination and other negative consequences. Reported cases suggest that potential whistleblowers may be dissuaded rather than encouraged.

63. *To what extent can the government carry out its responsibilities in accordance with the wishes of citizens free of interference or constraint from political or economic forces outside of South Africa?* (5)

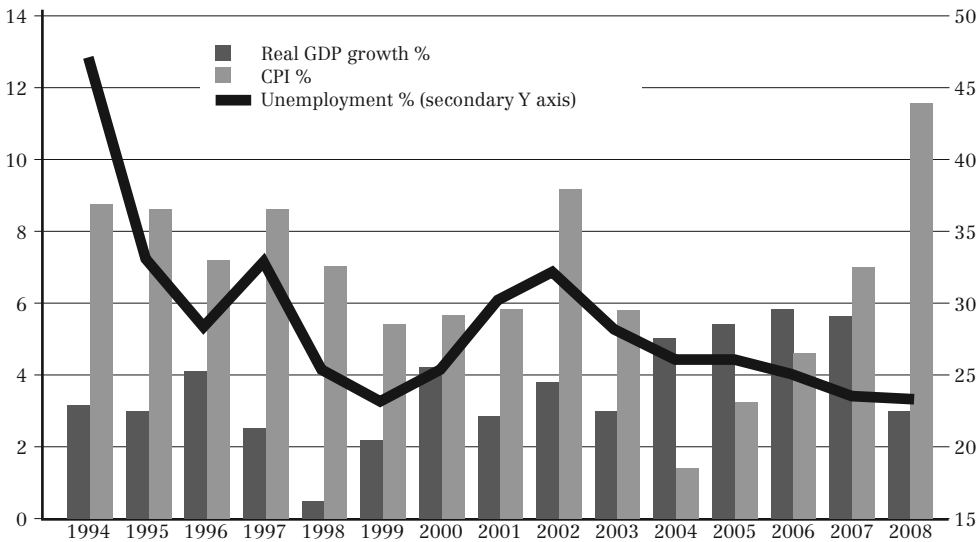
South Africa's economic independence and sovereignty are relatively robust compared to other developing countries. While it performs comparatively well across a range of indices, the country is somewhat open to external influences, including the current global economic recession, and faces a number of serious structural challenges.¹⁷⁷

Table 3.1: *South Africa country brief*¹⁷⁸

Total population (<i>millions</i>)	48.7
Population growth (<i>annual %</i>)	0.4
Life expectancy at birth (<i>years</i>)	50
Poverty headcount ratio at \$2 a day (<i>purchasing power parity</i>)	34
GDP (<i>current US\$</i>) (<i>million</i>)	276
GDP growth (<i>annual %</i>)	3.1
Gross national income per capita, Atlas method (<i>current US\$</i>)	5 390
Inflation, consumer prices (<i>annual %</i>)	11.9
Foreign direct investment, net inflows (<i>% of GDP</i>)	0.8
Unemployment, total (<i>% of total labour force</i>)	22
Time required to start a business (<i>days</i>)	22
Internet users (<i>per 1 000 people</i>) (<i>2004 figure</i>)	109

The 2009 World Bank Country Brief¹⁷⁹ indicates that economic growth, while not spectacular, has nonetheless been solid.¹⁸⁰ Greater integration with the global economy has resulted in a “sharp turnaround in productivity performance over the past fifteen years”. However, overall export performance “remains disappointing and has further deteriorated recently as a result of weakening global demand and falling prices”.¹⁸¹ The resulting deficit is exposed to short-term financial flows driven by the Reserve Bank's fairly tight monetary policy and inflation targeting, and is compounded by a low domestic savings rate and “insignificant” foreign direct investment,¹⁸² which is deterred by a range of domestic factors.¹⁸³

While the World Bank views South Africa's success in stabilising the economy as “impressive”, high unemployment is seen as “the most important constraint to both poverty reduction and accelerating growth” in South Africa. Unemployment levels have increased from around 15% at the fall of apartheid to the current 22%,¹⁸⁴ while real wages have remained “essentially stagnant”.

Figure 3.1: SA real GDP growth, inflation and unemployment¹⁸⁵

Government sees growth as critical to South Africa's ability to "create more jobs and reduce inequality." However, while government programmes reduced "absolute" poverty by 10 percentage points to 48% from 2000 to 2005, inequality remains at a stubbornly high level,¹⁸⁶ which the World Bank describes as "extreme" inequality (a critical measure of long-term stability).¹⁸⁷ The country's "development strategy faces the twin challenges of accelerating growth and sharing its benefits, by broadening participation, extending opportunities to all and improving the impact of public service delivery".¹⁸⁸

The government has been widely criticised, including by its alliance partners, the Congress of South African Trade Unions (Cosatu) and the South African Communist Party, for economic policies perceived to be too closely tied to the "Washington Consensus" and its inability to address these fundamental structural weaknesses. There is widespread popular dissatisfaction with the government's failure to control price increases, create jobs and narrow the gap between rich and poor.¹⁸⁹ However, most respondents to a recent Afrobarometer Survey believed that the government was not unduly or excessively beholden or subordinated to outside forces.¹⁹⁰

The country's exposure to global trends is recognised in the 2009 National Budget Review,¹⁹¹ which observes that the "global banking and credit crisis has precipitated a sharp and deep contraction in the world economy". While "[s]ound fiscal and monetary policies,¹⁹² a well-regulated financial system and prudential limits on foreign investment have helped to limit South Africa's exposure to the [global financial and economic] crisis", in combination with "cyclical domestic factors", they have not prevented a significant deterioration in South Africa's growth outlook. This will inevitably limit revenue growth and place constraints on the government's ability to address its priorities.¹⁹³

The onset of recession in much of the developed world has affected developing countries such as South Africa “through lower export demand, weaker commodity prices, higher cost of capital, reduced capital flows and falling asset prices.”

South Africa’s economic performance is significantly dependent on exports, which fall within a band of 20-40% of GDP.¹⁹⁴ The contribution of exports to annual GDP rose from 28.1% in 2003 to a peak of 36.6% in the second quarter of 2008, and has fallen since then to 21.4% in the second quarter of 2009. Simultaneously, South Africa’s trade balance has followed a consistent downward trend since 2002, when it stood at R38.7 billion, to a negative balance of –R87.7 billion in 2008.

Although exports have become less and less reliant on commodities as the proportion of mining exports has declined from 54% in 1992 to 33% in 2008, manufactures have increased from 40% to 63% over the same period.¹⁹⁵ While South Africa’s terms of trade improved by 20% between 2000 and 2007, commodity terms of trade have been very volatile, declining by 20% on average over the period, compounding the effects of volatile exchange rate fluctuations on export revenues, where the weighted average real indices have changed from –14.6 in the final quarter of 2008 to +14.6 in the second quarter of 2009. Capital movements show similar volatility: foreign direct investment was R58.4 billion in 2001, declined to –R3.6 billion in 2006 and increased again to R74.3 billion in 2008.¹⁹⁶ Over the same period, portfolio investment ranged from –R24 billion, and climbed to R144.5 billion in 2006, before collapsing to –R68 billion in 2008.

Such significant dependence on exports, together with volatility in these key indicators and low domestic savings, combine to render South Africa vulnerable to external economic forces beyond its control.

64. How far is the government able to influence or control those things that are most important to the lives of its people, and how well is it organised, informed and resourced to do so? (4)

South Africa is a middle income country, with a large and growing economy, the biggest in Africa, but facing significant challenges. One of those is to overcome the educational backlog and consequent skills deficit – malign legacies of apartheid that, along with the sheer scale of other socio-economic inequalities, continue to undermine the ability of the state to deliver basic services, including health, housing, water, sanitation and electricity, and education itself. Together with the demands of global competitiveness, these constraints have resulted in an apparent structural inability to make a meaningful impact on high levels of unemployment.

The government is well informed about the scale of the challenges, and is generally well served by key state agencies such as Statistics South Africa, as well as private and international sources of information, concerning socio-economic conditions in the country. Financially, the state is comparatively well resourced due to a relatively strong economy and efficient revenue collection by the South African Revenue Service and budgeting managed by the National Treasury. The Presidency’s strong policy

function has been boosted by new, potentially influential capacity in strategic planning and performance monitoring and evaluation.¹⁹⁷

Over the past 15 years, the government has embarked on ambitious programmes of service delivery and public service transformation, in line with constitutional imperatives that public administration must be both development-oriented and representative of the population.¹⁹⁸ However, the state's inability to deliver basic services is the subject of constant scrutiny and criticism. Persistent bureaucratic incapacity and inefficiency are increasingly criticised, often violently, by dissatisfied residents engaged in spreading "service delivery protests".¹⁹⁹

Conclusion

The period under review has offered many disappointments, punctuated by glimpses of affirmation of the essential value of vibrant democratic institutions. While the 2009 elections were technically exemplary, the opaque relationship between political and financial power loomed in the background. At critical junctures, choices have been made about leaders' accountability that appear to be driven primarily by political considerations, and that threaten to weaken vital institutions, such as the courts, the NPA and the Presidency. Welcome advances for democratic accountability, such as the scrapping of floor-crossing legislation, have been promptly followed by other draft constitutional amendments that either ignore Constitutional Court rulings or seek to change key features of the political settlement that underpins the Constitution. This apparent alacrity is not mirrored by similar diligence to close major loopholes in the country's ethics architecture. Welcome clarity concerning ethical standards for the judiciary has been muddled by the fears prompted by politically coloured attacks and interventions.

Parliament, as the central democratic institution, remains vulnerable to pressure from what should be its secondary constituency. Scopa has yet to show that it has rebalanced the scales of its arms deal legacy.

Prospects of a significant improvement in the state's ability to deliver social justice, the bedrock of democratic stability in a rapidly globalising society, are hard to identify.

Determined corrective action to professionalise and galvanise an underperforming public service in the face of key challenges posed by party deployment, global recession, climate change, and growing energy and food supply insecurity is not currently evident.

Unless the popular conception of a "better life" is radically redefined globally, the mounting crisis of expectations locally may overwhelm less immediate considerations of democratic accountability. Fine distinctions concerning the appropriate balance between judicial independence and accountability, for example, may be lost amid the welter of popular demands unless perceptions of the "greater good" are redefined to more closely match fundamental global challenges. Conversely, arguments in favour of maintaining a degree of insulation of public representatives from the sometimes

overambitious and impractical demands of an impatient electorate threaten to be drowned out by public anger at the growing detachment from the struggles of daily existence offered by the generous benefits of public office.

Fresh temptations to fudge the fundamental characteristics and vitality of democratic institutions must be firmly resisted. Tried and tested mechanisms for ensuring democratic accountability from entrusted leadership are all we have to stabilise the raft of state, and to ensure that we all continue to stay afloat as we find ways to thrive together.

ENDNOTES

- 1 While all errors remain my own, I am most grateful to my Idasa colleagues who gave generously of their time and expertise to ensure that the hare crossed the finish line: Douglas Racionzer, for early strategic advice; Moira Levy, whose practised hand “slashed and burned” the Hydra’s heads; Paulos Eshetu, for righting the ship amidst the ensuing storm; Len Verwey, for sharing his democratic budgeting expertise; Saranne Durham, for her insights and good sense; and Neeta Misra-Dexter, whose endless patience shames me, for her clear vision.
- 2 See, generally, D.D. Raphael, 1976, *Problems of Political Philosophy*, Macmillan.
- 3 Robert D. Behn, 2001, *Rethinking Democratic Accountability*, Brookings Institution Press, p. 6 ff.
- 4 Someone of a different political or economic persuasion might, of course, reasonably argue that “fairness” relates also to outcomes; that the fairness of the consequences of a government’s actions, rather than merely of the manner in which it conducts its activities, is a legitimate matter for democratic concern.
- 5 J.E.E. Acton (Lord Acton), in a letter to Mandell Creighton in 1887.
- 6 Richard Calland and Paul Graham, 2005, *Idasa’s Democracy Index: Democracy in the Time of Mbeki*, Cape Town: Idasa, p.167.
- 7 The discussion of Questions 51-52 in this section deals with the Money Bills Amendment Procedure and Related Matters Act 9 of 2009, which gives the national legislature significant authority in the budget process and, potentially, greater influence generally. The Financial Management of Parliament Act 10 of 2009, asserts Parliament’s unique constitutional role and status.
- 8 Words commonly attributed to Thomas Jefferson, third president of the United States of America. Thus the fact that parliamentary processes were duly followed in passing the legislation to disband the Directorate of Special Operations (better known as the Scorpions) and in Parliament’s endorsement of President Kgalema Motlanthe’s dismissal of Vusi Pikoli from his position as head of the National Prosecuting Authority (NPA) does not change the widely held perception that these processes failed to confront and interrogate the reasonableness of the executive’s underlying motives and intentions. See S. Seedat, 2009a, “Parliament must act with great diligence in pronouncing on the Pikoli matter”, Cape Town: Idasa, 10 February, available at http://www.idasa.org/index.asp?page=output_details.asp%3FRID%3D1735%26oplang%3Den%26TID%3D12%26OTID%3D26.
- 9 APRM, 2007, p. 86-87, p. 98. Global Integrity, *South Africa: 2008*, Washington, DC: Global Integrity. The rule of law is established in section 2 of the Constitution, which declares that it is “the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.
- 10 Public Finance Management Act 1 of 1999, as amended.
- 11 Political parties receive modest funding in terms of the Public Funding of Represented Political Parties Act 103 of 1997. The IEC administers the funds.
- 12 Section 46 read with the provisions of Schedule 6A of the Constitution, 1996, and with the Electoral Act, 1998 (as amended) and its Schedule 1A.
- 13 “In order for it to exercise its vanguard role, the ANC puts a high premium on the involvement of its cadres in all centres of power.” ANC, 2007, *Strategy and Tactics of the ANC*, para. 127, available at http://www.anc.org.za/ancdocs/history/conf/conference52/strategy_tactics.html.

- 14 Floor-crossing (retaining one's seat in a legislature after joining or forming another political party, other than by election) was legalised by Acts 18, 20, 21 and 22 of 2002 and accepted by the Constitutional Court in *United Democratic Movement v President of the RSA & Others (African Christian Democratic Party and Others intervening: Idasa and Another as amici curiae) (No. 2)* 2003 (1) SA 495 (CC). Now, however, elected public representatives are once again obliged to continue between elections to represent electors on the basis of manifestos endorsed at election time, unless they resign.
- 15 Khutsong municipality, for example, was "moved" from the relative affluence and greater opportunities of Gauteng province to the North West. The decision unleashed years of sustained and sometimes violent public protests.
- 16 See, for example, the work of the Global Transparency Initiative (<http://www.ifttransparency.org>).
- 17 Promotion of Access to Information Act 2 of 2000; *Biowatch Trustees v Registrar of Genetic Resources CCT 80/08* [2009] ZACC 14 (3 June 2009) strengthened the ability of individuals to hold accountable the executive branch of government through the mechanism of public interest litigation, by weakening the spectre of legal costs incurred in the enforcement of the right of access to information in possession of the state. The High Court granted eight out of 11 requests. The Constitutional Court held that, despite the sweeping nature of the requests made, the registrar should pay Biowatch's costs.
- 18 CCT 19/07 [2008] ZACC 8, 2 June 2008.
- 19 The Constitution Eighteenth Amendment Bill of 2009 would allow the proposed State Liability Amendment Act, once passed, to be insulated from judicial review, by rendering the provisions of the Bill of Rights, *inter alia*, inapplicable to it.
- 20 In terms of the existing State Liability Act 20 of 1957, public representatives and public servants can be held civilly liable in their representative capacity in defence of individual rights.
- 21 In *S v Yengeni* 2006 (1) SACR 405 (T) (11 Nov 2005), Tony Yengeni, then ANC Chief Whip in Parliament, was convicted of fraud and sentenced to a prison term. In *S v Zuma* 2006 (2) SACR 191 (W) (8 May 2006), Jacob Zuma, now President of the Republic, was acquitted of a charge of rape. For cases involving accountability of the executive for official decisions, see *President of the RSA v SARFU* 1999; *Executive Council of the Western Cape Legislature and Others v President of the RSA and Others* CCT 27/95 (22 September 1995); and *Carmichele v Minister of Safety and Security and Others* CCT 48/2000.
- 22 The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, is based on the empowering provisions of the Constitution; sections 58 and 117 apply to the national and provincial legislatures respectively.
- 23 The arms deal was controversial for a number of reasons. Yengeni was convicted, as was Schabir Shaik, financial adviser to and friend of Jacob Zuma, and a private businessman, who benefited unduly from some of the many contracts that formed part of the package. See *S v Shaik & Others* CCT 86/06 [2007] ZACC 19; 2008 (2) SA 208 (CC) 2 Oct 2007. On who allegedly has not been held to account, see Andrew Feinstein, 2007, *After the Party*, Jonathan Ball; and Paul Holden, 2008, *The Arms Deal in your Pocket*, Jonathan Ball.
- 24 See note 8 above. See also SAPA, 2009e, "Pikoli to fight appointment of successor", *Mail & Guardian*, available at <http://www.mg.co.za/article/2009-07-22-pikoli-to-fight-appointment-of-his-successor>
- 25 The Ginwala Inquiry's report was released in November 2008.
- 26 *NDPP v Zuma 573/08* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) 12 Jan 2009.
- 27 Judith February and Gary Pienaar, 2009, "Court best placed to decide if tapes have fatally damaged case against Zuma", *Cape Times*, 3 April, available at <http://www.capetimes.co.za/index.php?fArticleId=4919084>.
- 28 The Executive Members' Ethics Act 82 of 1998, authorises the Office of the Public Protector, an independent institution established by section 187 of the Constitution, 1996, to strengthen constitutional democracy, to investigate alleged breaches and to recommend corrective action.
- 29 See, for example, Alex Eliseev, 2009, "Kings and queens of bling: politicians in waBenzi frenzy," *Cape Times*, 12 June; and SAPA, 2009f, "Vavi slams extravagant spending in public service," *Mail & Guardian*, 26 October.
- 30 ANC, 2007, para. 56.
- 31 APRM, 2007, p. 101.
- 32 See Questions 51-53 below.
- 33 Independent Panel, 2008, p. 17.
- 34 Independent Panel, 2008; APRM, 2007.
- 35 Independent Panel, 2008, p. 36.
- 36 See, for example, Richard Calland, 2006, *Anatomy of South Africa: Who Holds the Power?* Zebra, p. 109; Independent Panel, 2008, p. 36 ff.
- 37 Independent Panel, 2008. The OAM was adopted in principle by Parliament's Joint Rules Committee on 19 March 2008.
- 38 See, for example, OAM, 2008, *Oversight and Accountability Model*, p. 25 ff., available at <http://www.pmg.org.za/files/docs/080319oversightmodel.pdf>; Independent Panel, 2008, p. 45 ff.; APRM, 2007, para. 208, p. 102.

- 39 Judith February, 2008, "Sleeping giant has awoken but is yet to prove itself", *Business Day*, 10 March.
- 40 For example, problems with policy and its implementation in the Departments of Home Affairs and Health, and at parastatals such as Eskom, have been subjected to more rigorous debate. See generally <http://www.pmg.org.za/>. See N. Chanza, 2009, "Reflections on Parliamentary oversight over the past year: 2008", unpublished paper, Political Information and Monitoring Service, Idasa.
- 41 Section 92 of the Constitution allows MPs to question members of the executive on their performance in the management of their portfolios.
- 42 OAM, 2008, p. 21 ff.; Independent Panel, 2008, p. 33.
- 43 APRM, 2007, para. 125, p. 82.
- 44 Sections 40, 41, 43 and 44 of the Constitution, 1996, particularly section 44(2).
- 45 Christelle Terreblanche, 2009, "Zuma hints at rejig of provincial, municipal governments", *Cape Times*, 25 June.
- 46 SAPA, 2009g, "Cabinet approves draft bill", *Independent Online*, 16 April. The Bill provides for the "compulsory" transfer of municipal assets in a way that will reduce the powers of both the municipal and provincial spheres of government. In a further signal of measures that will serve to bolster the centralisation of government authority, Deputy Minister of Police Fikile Mbalula has mooted government's intention to transform the currently decentralised police service into a single national paramilitary force with military ranks and discipline, including the various metropolitan police services: Xolani Mbanjwa and Graeme Hosken, 2009, "One super cop force", *Independent Online*, 10 October.
- 47 Carol Paton, 2008, "Inside the ANC's brutal battle for power", *Financial Mail*, 25 July; Tony Weaver, 2009, "ANC says sorry to Cape", *Cape Times*, 30 September; SAPA, 2009h, "Survey shines light on municipalities", *Independent Online*, 21 October.
- 48 Conceptual and practical overlaps between these questions and their answers suggest they may conveniently be considered together. In practice, "policy-making" is always undertaken by the executive, and law-making, while primarily the prerogative of the legislature, is often also undertaken by the executive where legislation gives them the authority to make law in the form of regulations.
- 49 Participatory procedures are, in principle and in law, extensive. In practice, however, despite some efforts to "take parliament to the people", significant practical obstacles prevent equal access and influence. Some of these inequalities could be overcome if citizens took more responsibility and more effectively utilised available resources and opportunities, and with a more active civil society enabling access in practice. I combine these two dimensions to reach a score of 5.
- 50 Meaningful access is negligible. The potentially most significant communication mechanism available in a parliamentary democracy, the constituency office, is ineffective in encouraging and facilitating public engagement with elected representatives. The perceived distance between "representatives" and "constituents", and the lack of accountability, remain significant, hence a score of 4.
- 51 Again, participatory procedures are, in principle and in law, extensive – hence a score of 8. The practical obstacles preventing equal access are more significant than in the case of law-making, as they are more dependent on literacy and modern communications – hence a score of 3. The average score is thus 5.5.
- 52 See, generally, Afrobarometer's 2009 survey. Afrobarometer, Summary of Results Round 4 Afrobarometer Survey in South Africa, April 2009, Citizen Surveys, www.citizensurveys.com. Available at: http://www.afrobarometer.org/Summary%20of%20Results/Round%204/saf_R4SOR_9apr09_final.pdf. Conceived as a means to encourage and facilitate public participation in policy-making and interactive governance, they are public meetings where the Presidency and provincial premiers communicate directly with citizens.
- 53 Constitution, 1996, section 195(1): "Public administration (understood to include policy-making and implementation) must be governed by the democratic values and principles enshrined in the Constitution", including the principle that "the public must be encouraged to participate in policy-making". This led to the 1997 White Paper on Transforming the Public Service, which launched the Batho Pele principles, including the obligation to consult with citizens on service delivery.
- 54 As one possible measure of policy openness and responsiveness, public perceptions of government's performance in "maintaining transparency and accountability" average barely 50% over a ten-year period, Markinor's *Government Performance Barometer* (1999, 2004, 2008), p. 92, cited in Presidency, 2008a.
- 55 S. Seedat, 2007 "Separating people from decisions that affect them" *Business Day* 13 September 2007. Available at: <http://www.businessday.co.za/articles/opinion.aspx?ID=BD4A563289>
- 56 Nedlac 2008 annual report.
- 57 Judith February, 2006, "Drastic need for the public to have more say in the decisions of government," *Cape Times*, 10 August.

- 58 S Friedman, 1999, "South Africa: Entering the post-Mandela era", *Journal of Democracy*, vol. 10, no. 4, cited in Krista Johnson, 2002, "State and civil society in contemporary South Africa", in Sean Jacobs and Richard Calland (eds) *Thabo Mbeki's World: The Politics and Ideology of the South African President*, University of Natal Press and Zed Books.
- 59 PSC, 2008a, pp. 55-56; PSC, 2007a.
- 60 Citizens themselves should be encouraged to find new ways of engaging effectively with the government, as long as these are within the law. M Ström, 2004, "Citizens now, not citizens in waiting ...", *Youth Vote South Africa No 16*, Idasa. Available at: http://www.google.com/custom?hl=en&client=pub-5026321334986445&cof=FORID:13%3BAH:left%3BS:http://www.idasa.org.za%3BCX:Idasa%2520Search%2520Engine%3BL:http://www.idasa.org.za/images/search_logo.gif%3BLH:100%3BLP:1%3BLC:%23245790%3BVLC:%230094B0%3BGALT:%230094B0%3BDIV:%23CCCCC%3B&cx=011398949797700025820:oaunv7w6b-e&adkw=AELymgVD-y5MICKPON8i3-8BP0ICnMVIA_gh90I4ILaXAvl_VbGWfsj84118K6Pj5R0eAT_yNZ5vKaQgApWVXJhKelgFMQB3IRCaSPXsk-9jnZDi2502mU&boostce=0&q=Strom&start=0&sa=N
- 61 Afrobarometer, 2009, Question 25C, found that 84% of respondents had never contacted a public servant to provide their view on an important problem.
- 62 Levin, R., 2004. "Building service effectiveness: Integrated governance and the developmental state," *Service Delivery Review* Vol 3 No 1, p 31, at p 44. Available at: http://www.dpsa.gov.za/documents/service_delivery_review/Vol3ed1/SDR_Vol3_Ed_1_complete.pdf. Cited in K. Lefko-Everett, 2008, "The status of public participation in South Africa" (unpublished), Idasa. Lefko-Everett also notes that citizens have a range of opportunities for participation which can be used more effectively, including *imbizos* with national and provincial executives, presidential working groups and consultation around provincial growth and development strategies. The Local Government: Municipal Structures Act 117 of 1998, requires municipalities to involve citizens in preparing, implementing and reviewing integrated development plans and performance management systems, in preparing budgets and in strategic decisions on service delivery. The Act also mandates municipalities to develop community capacity to participate effectively in these processes. Lefko-Everett notes that the then Department of Provincial and Local Government (now renamed the 'Department of Co-operative Governance and Traditional Affairs') conceded that many municipalities are not "fulfilling their legislative obligations".
- 63 See, generally, Idasa, 2003; Idasa, 2005, "Democracy and political party funding: Pursuing the public's right to know", media briefing note, 9 May 2005. Available at: www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1316; See also Idasa, 2005, *Handbook on Corporate Funding of Political Parties*, following from the October 2005 Melrose Arch Symposium, Idasa publication.
- 64 Constitution, 1996, section 42(3).
- 65 Constitution, 1996, sections 59 (National Assembly) and 72 (National Council of Provinces).
- 66 *Matatiele Municipality & Others v President of the RSA & Others* CCT 73/05 (27 February 2006) concerned the re-demarcation of the boundary between the provinces of KwaZulu-Natal and the Eastern Cape, in effect "moving" the Matatiele Municipality from KwaZulu-Natal to the Eastern Cape. The Constitutional Court found that the KwaZulu-Natal Provincial Legislature, by not holding any public hearings or inviting written submissions, had failed in its obligations. In *Doctors for Life International v Speaker of the National Assembly and Others* CCT 12/05 (17 August 2006), the Court found that "Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case", provided it is exercised reasonably.
- 67 The National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008 removed the Directorate of Special Operations from the relative independence of the NPA and created a replacement within the South African Police Service that would be directly accountable to the executive.
- 68 Four civil society organisations – Idasa, the Helen Suzman Foundation, the Institute for Security Studies and the Centre for the Study of Violence and Reconciliation – wrote to Parliament, objecting to the marginalisation of public opinion in the legislative process. Wyndham Hartley, 2008, "Parliament 'will not ignore public views'", *Business Day*, 6 August.
- 69 Parliament launched an annual initiative to "take Parliament to the people" in various provinces, and a pilot project establishing parliamentary democracy offices in three of the poorer, largely rural, provinces to serve as a "platform of interface between Parliamentary committees and local communities". See Parliament, 2006, "Chapter 8: Public participation and events", in *Parliament Since 1994: Achievements and Challenges*, Cape Town: Parliament of the Republic of South Africa; and Chapter 5, "Public participation", in Independent Panel, 2008.
- 70 Independent Panel, 2008, p. 7.

- 71 Parliament allocates funds to political parties to undertake constituency work, but without prescribing the location of constituency offices or the manner in which constituency work is performed. Funding for constituency support in Parliament's budget has increased dramatically in recent years, with an estimated expenditure of R295 117 000 in 2010-2011, but accountability for its effective use remains problematic.
- 72 The ability to identify the Member of Parliament responsible for their constituency is lowest among South Africans (Afrobarometer, 2009). The level of public contact with MPs is very low (about 14% during the year prior to the survey) and has been declining since 2004.
- 73 "The issue of public accountability of Members of Parliament to the electorate, and the ability of members of the public to contribute to parliamentary processes through constituency offices, goes to the heart of Parliament's vision of being a people's Parliament, as well as its role in strengthening democracy" (Independent Panel, 2008, p. 60). Even within the legislature there appears to be no common understanding of the role and function of constituency offices. They are inadequately resourced and staff inadequately trained. Widespread confusion among the public leads to diminished participation. Their de facto party-political character means that some "constituents" avoid using the constituency offices (Janine Hicks, 2003. *Government Mechanisms for Public Participation: How Effective are They?* Centre for Public Participation, p.7).
- 74 The extent of MPs' lack of accountability to their electors is exemplified by the fact that parliamentary leave management is still unresolved. Section 47(2) of the Constitution specifies that a member loses membership of the National Assembly if "absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership". There is currently no such rule. The matter is left entirely to political parties' whips to manage at their discretion and according to party discipline.
- 75 Sections 55(2), 56, and 57(2)(a) of the Constitution establish Parliament's authority. Sections 220-222 establish the Financial and Fiscal Commission to provide Parliament and provincial legislatures with independent and impartial advice on national finances, including budgetary allocations, while being accountable to Parliament.
- 76 Now termed the "Joint Appropriation Committee" in the Money Bills Act.
- 77 There were nine submissions in 2005, eight in 2006, four in 2007, eight in 2008 and seven in 2009; in total, 36 submissions in the period 2005-2009.
- 78 Hearings were thus an "exercise in catharsis rather than ports of engagement to influence spending patterns" (T. Ajam, 2008, "Budgetary oversight and poverty alleviation: Opportunities and challenges", AFReC, presented to Idasa's Roundtable on Parliament, the Budget and Poverty, 14 October).
- 79 Once allegations of corruption in government tendering and procurement processes around the purchase of armaments from European manufacturers began to surface, the chairperson of the committee – who had recommended the establishment of a commission of inquiry into the matter – was replaced with a chairperson less likely to support such a measure (Idasa, 2003, *Democracy and the Arms Deal*, Idasa; Feinstein, 2007; Holden, 2008; Global Integrity, 2008). Scopa has not shown enthusiasm to investigate new information suggesting that the Joint Investigating Team's final report was substantially altered to deflect attention from wrongdoing by senior Cabinet members. See Scopa hearings and deliberations, 17 February 2009, available at <http://www.pmg.org.za/minutes/18>.
- 80 Joachim Wehner, 2009, "South Africa's new parliamentary budget process: An initial assessment", in Len Verwey, Kate Lefko-Everett, Ahmed Mohammed and Musa Zamisa (eds) *Parliament, the Budget and Poverty in South Africa: A Shift in Power*, Idasa. A concern remains about the extent to which the operations of the public sector, rather than government more narrowly, may have fiscal implications that dilute the role of the legislature. Thus, various state-owned enterprises (such as Eskom and South African Airways) have during 2008-2009 required "bail-outs" from the fiscus, in excess of transfers initially approved by the legislature, that had to be approved by Parliament later as a matter of necessity. This need for additional financial support was not solely due to the global financial crisis.
- 81 Wehner, 2009.
- 82 Ahmed Mohamed, 2009, "Budget oversight and the South African budget office", in Len Verwey, Kate Lefko-Everett, Ahmed Mohammed and Musa Zamisa (eds) *Parliament, the Budget and Poverty in South Africa: A Shift in Power*, Idasa.
- 83 Other committees may recommend that part of a vote be appropriated "conditionally", "to ensure that the money requested for the main division will be spent effectively, efficiently and economically". Wehner notes that there is no limitation on the sum of money that may be appropriated conditionally.
- 84 Wehner, 2009.
- 85 The tumultuous December 2007 ANC party conference, which unseated Thabo Mbeki as ANC president and replaced him with Jacob Zuma, was held in Polokwane, Limpopo province. It

- was notable for its unusually robust and open expression of dissenting views.
- 86 As suggested by Langa Zita at the launch of Len Verwey, Kate Lefko-Everett, Ahmed Mohammed and Musa Zamisa (eds), 2009, *Parliament, the Budget and Poverty in South Africa: A Shift in Power*, Idasa, in Cape Town on 13 October 2009.
 - 87 Hansard, as the official record of plenary parliamentary proceedings is known, has been badly behind schedule for extended periods.
 - 88 <http://www.pmg.org.za>.
 - 89 About 70% of South Africans get their news from radio or television (Afrobarometer, 2009).
 - 90 See Global Integrity, 2008, Question 9; Reporters Without Borders (<http://www.rsf.org>); and Freedom House (<http://www.freedomhouse.org>). In its 2008 report, Freedom House rated SA "free" with a ranking of 2 in a range from 1 (free) to 5.5 (not free). Its 2009 report rates media freedom at "free" with a total score of 28 on a range from 0 (best) to 100 (worst). Available at: <http://freedomhouse.org/template.cfm?page=251&country=7491&year=200>
 - 91 Pre-publication censorship concerns were fueled by the initial version of the Films and Publications Amendment Bill (B27-2006), which was widely criticised for the significant threat it posed media freedom in the country. A later (18 February 2009) version of the Bill (B27F-2006) focused more narrowly on controlling pornographic material and broadened exemption from pre-publication censorship to include all members of the print media recognised, regulated and adhering to a code of conduct enforced by the Press Ombudsman.
 - 92 Recent examples were the erstwhile Health Minister Manto Tshabalala-Msimang and former Finance Minister Trevor Manuel.
 - 93 Roy Greenslade, 2006, "Zuma libel claim is South Africa's largest", *The Guardian*, 4 July.
 - 94 Ray Hartley, 2008, "A sad, tearful goodbye to Essop Pahad", *The Wild Frontier* blog, available at <http://blogs.thetimes.co.za/hartley/tag/boycott/>.
 - 95 *Midi Television (Pty) Ltd v Director of Public Prosecutions* 100/06 [2007] SCA 56 (RSA) (18 May 2007), Nugent JA for a unanimous court.
 - 96 Calland, 2006, p. 32.
 - 97 The independent PSC reported in 2007 that the capacity of the public service to provide information was still a challenge, particularly when information was requested by individuals (compared to general information released through reports).
 - 98 According to Allison Tilley of the Open Democracy Advice Centre (ODAC), PAIA, which is supposed to facilitate public access to official information, "is so misunderstood in government circles that officials deny applications for fear of disclosing more than they are allowed to. This forces people to go to court, and the government has already lost so many of these cases" (Global Integrity, 2008, Question 13).
 - 99 Global Integrity, 2008, Question 12 ff; R. Calland and A. Tilley (eds), 2002, *The Right to Know, the Right to Live*, Open Democracy Advice Centre, p. 72 ff.
 - 100 *Biowatch Trustees v Registrar of Genetic Resources* CCT 80/08 [2009] ZACC 14 (3 June 2009).
 - 101 *Merafong Demarcation Forum and Others v President of the RSA and Others* CCT 41/07 (13 June 2008); *Chagi and 29 others v Special Investigating Unit* 89/07 (29 November 2007); *Matatiele Municipality and Others v President of the Republic of South Africa and Others* CCT 73/05 (18 August 2006); *Doctors for Life v Speaker of the National Assembly and Others* CCT 12/05 2006 (12) BCLR 1399 (CC) available at <http://www.constitutionalcourt.org.za>.
 - 102 Code of Conduct for Assembly and Permanent Council Members (Members' Code of Conduct), available at <http://www.pmg.org.za/parlinfo/codeofconduct>.
 - 103 Members' Code of Conduct, item 19.
 - 104 One MP, Mnyamazeli Boo, resisted a plea deal until September 2009, after he had been re-elected to Parliament as an ANC MP and appointed chairperson of the Portfolio Committee on Defence and Military Veterans.
 - 105 Section 47(1)(e) and (3) of the Constitution provides for loss of membership of the National Assembly if convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, provided that this prohibition lapses after five years. The Electoral Court upheld an IEC ruling and found that she was not barred from standing for election as, although five years had not passed since her conviction and sentence, she had received a suspended sentence, which distinguished her case. (SAPA, 2009i, "IEC rejects Winnie objection", *Independent Online*, 23 March, available at http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=nw20090323185836611C496669; SAPA, 2009j, "Green light for Madikizela-Mandela", *Independent Online*, 31 March, http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=nw20090331183241466C213019)
 - 106 Independent Panel, 2008, p. 80.
 - 107 Firstly, disclosure of gifts, benefits and hospitality is required only annually, leaving a wide margin for error or abuse in the interval between disclosures. The equivalent code for members of the executive prescribes that prior permission must be obtained for such benefits to be accepted and retained, but this is not required by the Members' Code of Conduct, leaving no ongoing oversight in respect of individual conflicts of interest at the time they arise. The responsibility rests entirely on individual

- Members to decide at the time whether a conflict may arise, and how to respond, for example, whether to decline the benefit..
- Secondly, there is no automatic audit of disclosures by the Registrar of Members' Interests, who is reliant on instructions from the Joint Committee on Ethics and Members' Interests. The preventive emphasis of the code is weakened by the fact that there is no provision in the Public Audit Act, Act 25 of 2004, governing the auditing of the asset disclosure forms of members of the national legislature.
- Thirdly, as with the Executive Members' Ethics Act 82 of 1998, the Executive Ethics Code and the Public Service Code of Conduct, the parliamentary code contains no post-employment restrictions, which represents a significant risk of law-making with an eye to future employment prospects.
- 108 Independent Panel, 2008, pp.79-80.
 - 109 Section 96 of the Constitution prescribes that members of the executive are prohibited from undertaking any other paid work; acting in a way that is inconsistent with their office; exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests; or using their position or any information entrusted to them to enrich themselves or improperly benefit any other person. They are obliged "at all times to act in good faith and in the best interest of good governance, and to meet all the obligations imposed on them by law" (Executive Members' Ethics Act, section 2(2)(a)).
 - 110 Wyndham Hartley, 2009, "Ethics shakeup after Merc debacle", *Business Day*, 21 May; "ANC public relations in a spin over car", *Business Day*, 21 May.
 - 111 He subsequently called for a review and clarification of the code.
 - 112 On 23 May 2006 the Joint Committee on Ethics and Members' Interests adopted the Auditor-General's Report on the Alleged Non-disclosure of Ministers and Deputy Ministers. In regard to alleged non-disclosure of interests, the committee noted that there was no conflict of interests and also no evidence that any members had promoted their financial interests.
 - 113 The MPs' code contains possible sanctions that the joint committee may recommend to the Speaker. Public service discipline is regulated in terms of the Public Service Act 103 of 1994, and the Public Service Code, which allows dismissal for breaches. Alleged breaches of the executive code are to be investigated by the Public Protector, who has the discretion to recommend that sanctions be considered by the legislatures concerned.
 - 114 For example, Independent Panel, p. 79 ff.
 - 115 PSC, 2006, *Report on Managing Conflicts of Interest in the Public Service*, Public Service Commission, p. 29: "Essentially one cannot disagree with the fact that there is a need for 'cooling off' periods."
 - 116 PIMS, 2008, "Submission by the Political Information and Monitoring Service on the draft Public Service Administration Bill, 2008", Idasa, 30 April. Available at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=2200>.
 - 117 Auditor-General, 2008, "Report on a performance audit of entities that are connected with government employees and are doing business with national departments", Office of the Auditor-General, August. The Auditor-General found that 835 members of the senior management service – 53% of the sample investigated – were involved in some way with private companies that could "pose a potential conflict of interest".
 - 118 Pregs Govender and Mpumelelo Mkhabela, 2009, "Ambassador named in R21m tender scandal", *The Times*, 18 July, available at <http://www.saelections.co.za/articles/6294/ambassador-named-in-r21m-scandal>; *Business Times*, 2009, "Let's have action, not just talk, on tender cheats", *Sunday Times Business Times*, 20 June 2009; Siseko Njobeni, 2009, "Power programme suspends official after corruption tip", *Business Day*, 20 March; Stefaans Brümmer and Sam Sole, 2008, "Eskom's big connections" *Mail & Guardian*, 13 June; Makhudu Sefara, 2008, "Minister in R70bn tender fix", *City Press*, 27 April.
 - 119 Public Protector, Report No. 30 of 2008/9. The erstwhile Minister for Environment Affairs and Tourism, Valli Moosa, was appointed chairperson of the board of Eskom, the state-owned electricity utility, while simultaneously being a senior official of the ANC. The Public Protector found that there was "a conflict between the personal interest of Mr. Moosa in the ANC and his duty towards Eskom at the time when the Board resolved to award the Medupi Boiler Contract to the Hitachi Consortium, in which the ANC has an interest" and that he had "failed to manage his said conflict of interests in compliance with the Conflict of Interest Policy of Eskom and therefore acted improperly".
 - 120 See for example, Sipho Khumalo, 2008, "ANC offers business owners connections", *Independent Online*, 13 August, available at http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=vn20080813060333678C937904; Thembelihle Tshabalala and Mandy Rossouw, 2008, "Buy a date with Blade", *Mail & Guardian*, 15 August; SAPA, 2007, "Nothing wrong with selling 'face time' – ANC", *Independent Online*, 18 February, available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20070218164526609C400856. Simpiwe Piliso 2009, "Gravy train on track", *The Times*,

- 15 July reports that nearly a "third of the members of the ruling party's highest decision-making body are directors of empowerment companies worth billions. *Business Times* has established that the ANC's 87-member national executive committee includes 28 individuals who have interests in more than 69 companies."
- 121 Richard Calland, 2005, "Old and nouveau: A congealing overlap of money and politics", *Mail & Guardian*, 27 September.
 - 122 Moshoeshoe Monare, 2008, "Guidelines will root out corruption", *Pretoria News*, 27 October. Ramaphosa said the ANC would soon develop guidelines (proposed at the party's 2007 Conference) on how its members and leaders in business should conduct themselves. "So, the problem has been identified and it will be dealt with, most effectively. We need to deal with these issues to limit temptations for corruption. The ANC has to take a stand, a clear stand, on dealing with this," he is quoted as having said.
 - 123 Adriaan Basson and Qudisiya Karrim, 2009, "Zuma Cabinet Inc", *Mail & Guardian*, 15 May; Norah Mallaney, 2009, "Cha-Ching! In South Africa, Zuma's Cabinet Stocked with Potential Conflicts of Interest", *Global Integrity*, 15 May, available at <http://commons.globalintegrity.org/2009/05/cha-ching-in-south-africa-zumas-cabinet.html>.
 - 124 Idasa, 2003; and Vicki Robinson and Stefaans Brummer, 2006, *Democracy Incorporated: The Co-optation of Politics by Business in South Africa*, Institute for Security Studies. See also the resources available at www.whofundswho.org.za.
 - 125 These include an undertaking to the High Court in the government's response to Idasa's application for the disclosure of several parties' private sources of funding: *IDASA v ANC and Others* (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) 20 April 2005; and the ANC's 2007 Conference Resolution, paragraph 63. Available at: <http://www.anc.org.za/ancdocs/history/conf/conference52/index.html>
 - 126 SAPA, 2009k, "Phosa – No disclosure on party funding yet", *Independent Online*, 15 April, available at http://www.iol.co.za/index.php?from=rss_South%20Africa&set_id=1&click_id=13&art_id=nw20090415152902177C952306.
 - 127 PIMS, 2007, "Ethics, corruption and political parties: South Africa, a case for internal regulation and disclosure", Policial Information and Monitoring Service, Idasa 2007.
 - 128 Niehaus, a national spokesperson for the ANC, had engaged in a series of dishonest and fraudulent activities over several years, much of it apparently known to the party. SAPA, 2009l, "Mantashe: ANC has not lost moral authority", *Mail & Guardian*, 18 February; SAPA, 2009m, "Mashatile: I warned ANC about Niehaus", *Mail & Guardian*, 18 February; *Saturday Star*, 2009, "Niehaus fraud – ANC knew all about it", *Independent Online*, 14 February; Reuters, 2009a, "ANC spokesperson Niehaus steps down", *Mail & Guardian*, 13 February; SAPA, 2009n, "ANC won't throw Niehaus 'in the dustbin'", *Mail & Guardian*, 14 February.
 - 129 Global Integrity, 2008, Question 36 ff.
 - 130 APRM, 2007, para. 193, p. 99.
 - 131 Judgments consist of both a court order and the reasons for the order. Generally, reasons precede a court order. At times, orders can be made without reasons, but in these cases reasons are usually given shortly thereafter, failing which reasons can be requested in terms of rule 49(1)(c) of the High Court Rules.
 - 132 *Judicial Ethics in South Africa: Guidelines for Judges*, judges' voluntary code of conduct, issued by Judge President of the Constitutional Court and Chief Justice of the Supreme Court of Appeal, March 2000; S. Seedat, 2007, *Judicial Accountability Mechanisms: A Resource Document*, Idasa, March 2007.
 - 133 For example, Cape Judge President John Hlophe received an ethically dubious retainer from the Oasis Group, which gave rise to a conflict of interest when he failed to recuse himself from a 2005 decision granting Oasis permission to sue a colleague on the bench.
 - 134 Post-employment restrictions for the judiciary mean that retired judges will be able to engage in paid work when they are no longer on the bench, but only on condition that written permission is received from the Minister of Justice in consultation with the Chief Justice.
 - 135 A modest majority of respondents to the 2009 Afrobarometer survey (59%) feel the judiciary is fairly or largely free from corruption (Q49H), while 68% of respondents expressed a strong respect for the courts (Q44A).
 - 136 Department of Justice and Constitutional Development, 2008a, *Review of the Criminal Justice System*.
 - 137 Natasha Marrian, 2009, "Appointment of judges 'not entirely transparent'", *Mail & Guardian*, 7 July; and Shameela Seedat, 2009b, "Selection of four new judges will test new waters", *Business Day*, 5 June.
 - 138 It can be traced to five Bills introduced by then President Mbeki that were widely feared to be signaling an attempt by the executive to rein in the power of the judicial branch of the state (S. Seedat, 2005, "Tread warily in judging the judges", Idasa, 11 April; S. Seedat, 2006, "Restructuring the courts through the judiciary bills", Idasa, 15 June).
 - 139 SAPA, 2009o, "Radebe pushes ahead with transformation Bill", *Mail & Guardian*, 24 June; SAPA, 2009p, "Selection of new judges on hold", *Independent Online*, 9 June; *The Times*, 2008, "New judges might tip the scales of justice",

- 23 June; *The Times*, 2009, "Radebe pushes for transformation bill", 24 June.
- 140 SAPA, 2009q, "Zuma to name new Chief Justice", *Independent Online*, 1 October
- 141 SAPA, 2008, "Eliminate anti-Zuma elements – Malema", *Cape Times*, 14 July.
- 142 30 June 2008, <http://www.mg.co.za/uploads/mgdeclaration.pdf>.
- 143 Karyn Maughan and Gill Gifford, 2008, "Pikoli fired for Mbeki snub", *Independent Online*, 9 December 2008, available at http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=vn20081209054659682C179732; S. Seedat, 2009c, "Pikoli: Parliament should play the ball not the man", *Cape Times*, 5 February.
- 144 Judith February and Gary Pienaar, 2009, "Court best placed to decide if tapes have fatally damaged case against Zuma", *Cape Times*, 3 April.
- 145 Helen Zille, 2009, "Will cadre deployment grind the wheels of justice to a halt for Zuma?", 1 April, available at <http://www.da.org.za/newsroom.htm?action=view-news-item&id=6570>.
- 146 Reuters, 2009b, "Zuma calls for checks and balances", *Independent Online*, 7 April.
- 147 Ernest Mabuza, 2009, "Judges aim for judicial independence", *Business Day*, 9 July.
- 148 Reuters, 2009c, "We respect judicial independence, says Zuma", *Mail & Guardian*, 6 July.
- 149 Such as those of the cross-border municipalities discussed above.
- 150 See discussion under "Executive accountability and legislative oversight" above.
- 151 Gary Pienaar and Shameela Seedat, 2009, "Submission on the Draft Constitution 18th Amendment Bill, 2009 and the Draft State Liability Bill, 2009", 8 July, Idasa, available at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=2577>.
- 152 Section 59 of the Constitution requires Parliament to "conduct its business in an open manner, and hold its sittings and those of its committees, in public". The National Assembly "may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society".
- 153 Parliamentary Monitoring Group, <http://www.pmg.org.za>.
- 154 See, for example, Scopa meeting reports of 8 July 2009 and 7 August 2009. Available, respectively, at: <http://www.pmg.org.za/report/20090708-auditor-general-performance-audit-entities-are-connected-government-e> and <http://www.pmg.org.za/report/20090807-auditor-generals-performance-audit-entities-disclosure-interests>. See also Donwald Pressly, 2009, "More senior civil servants hide dealings", *Business Report*, 11 August.
- 155 Carieu du Plessis and Own Correspondent, 2009, "There'll be no jobs for friends", *Cape Times*, 4 May.
- 156 PSC, 2007b, *Fourth Consolidated Public Service Monitoring and Evaluation Report*, Public Service Commission, October; and PSC, 2008a, p. 37 ff.
- 157 Parliament of the Republic of South Africa, 2007, *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* (generally referred to as the "Asmal Committee" after its chairperson, Professor Kader Asmal, MP), 31 July, p. 92.
- 158 See OAM, 2008, p. 21 ff., recommendations for improving parliamentary monitoring of implementation. The PSC's 2009 "State of the Public Service Report" asserts: "Despite the many accountability mechanisms in place, implementation is not optimal ... sound financial management and the timely completion of Performance Agreements [are deficient]..., and what is even more worrying is that no sanctions are imposed in cases of non-compliance."
- 159 Mbeki's government also proposed, as additional delivery programmes and standards, a set of Apex Priorities; the Accelerated Shared Growth Initiative for South Africa (ASGI-SA); the 2008 Development Indicators; and a retrospective performance review, *Towards a Fifteen Year Review*, in 2008.
- 160 Tony Leon and Gareth van Onselen, 2008, "A country where it is okay to fail", *Cape Argus*, 13 March.
- 161 Accountability is in terms of performance agreements determined by the Presidency and Cabinet on the basis of government's Programme of Action. Heads of department will, in turn, sign performance agreements with their Ministers, and these will presumably also be monitored by the PSC, as in the past.
- 162 During (unsuccessful) litigation by Idasa to secure party funding transparency (*Idasa and Others v African National Congress and Others* Case No. 9828/03 Cape High Court, 20 April 2005), the ANC gave an undertaking to the court to introduce legislation to ensure transparent regulation of the issue. Despite a resolution taken at the ANC's 52nd Policy Conference, held in Polokwane in December 2007, promising urgent action by government in this regard, ANC treasurer-general Mathews Phosa recently stated that private funding would be regulated only when public funding was "sufficient" (SAPA, 2009k). When that point will be reached has not been clarified.
- 163 In terms of the Public Funding of Represented Political Parties Act, 1997, about R92 million has been allocated for the 2009-2010 financial year.

- 164 Significant controversy has surrounded activities of the "Chancellor House Trust", an investment management vehicle for the ANC, which relied on raising funds from black economic empowerment (BEE) companies controlled by ANC-deployed cadres that had been awarded government tenders. (Sipho Khumalo, 2008)
- 165 Keith Ross, 2009, "ANC's foreign funding debated", *Independent Online*, 28 April, available at http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=vn20090428110456671C554034.
- 166 South African Competition Commission, <http://www.compcom.co.za>.
- 167 Transparency International's *Bribe Payers Index 2008* ranks South African at 14th out of 22 countries whose businesses are likely to pay bribes.
- 168 See, for example, Stefaans Brümmer and Sam Sole, 2008; Public Protector, Report No. 30 of 2008/9; Andile Sokomani, 2008, "All is not well with government tenders", Institute for Security Studies, 25 June 2008, available at http://www.issafrica.org/index.php?link_id=5&slink_id=6161&link_type=12&slink_type=12&tmpl_id=3. See also G. Pienaar 2008, "Procurement corruption" *New Agenda* Issue 31 Third Quarter 2008, p46. http://www.newagenda.org.za/images/content/issue31_content.jpg
- 169 See section 195 of the Constitution; the Public Service Act, 1994; and the Code of Conduct in the Public Service Regulations, 2001.
- 170 For example, there are no post-employment restrictions limiting the "revolving door" syndrome. Nor is there any regulation of former public servants lobbying their erstwhile employers. The draft Public Administration Management Bill, introduced in 2008 but subsequently withdrawn, contained modest provisions proposing the regulation of post-employment opportunities, but only in respect of public servants involved in procurement functions.
- 171 Global Integrity, 2008.
- 172 In Afrobarometer, 2009, Question 51 indicated that only 10% of respondents had had to pay a bribe, give a gift or do a favour in exchange for public services.
- 173 This framework includes the comprehensive Prevention and Combating of Corrupt Activities Act, 2004, and the PFMA's extensive regulatory framework for state expenditure and procurement.
- 174 "Hearings on Auditor General Report [dated August 2008] on performance audit of entities connected with government employees and doing business with national and provincial departments", Scopa meeting report 8 July 2009, available at <http://www.pmg.org.za/report/20090708-auditor-general-performance-audit-entities-are-connected-government-e>. Evidence to Scopa revealed that very few public servants had faced disciplinary action, despite being named in the Auditor-General's report.
- 175 Section C.4.10.
- 176 Global Integrity, 2008.
- 177 For example, GNI per capita (PPP) grew from \$6 460 in 2000 to \$9 450 in 2007, and gross capital formation trended upwards from 16% to 21% of GDP over the same period. While imports grew from 25% to 35% of GDP, exports also grew from 28% to 32%, and national revenue has increased from 26.3% to 32% of GDP. Before the global financial crisis, the country's cash deficit improved from -2% to a surplus of 1.7% during the same period. (Source: World Bank, 2009a, *Key Development Data and Statistics*, available at <http://go.worldbank.org/1SF48T40LO>.)
- 178 World Bank, 2009a.
- 179 World Bank, 2009b, *Country Brief: South Africa*, March, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOUTHAFRICAEXTN/0,,menuPK:368086~pagePK:141132~piPK:141107~theSitePK:368057,00.html>.
- 180 Between 1994 and 2003, real GDP grew at an average of about 3%, which was about three times the growth rate recorded between 1980 and 1993. The growth rate for 2004-2007 rose to about 5%, before dropping to a projected 3.1% in 2008 as a result of the global economic slowdown.
- 181 South African exports at the time of writing were "a low" 18% of GDP, having fallen by almost 25% year-on-year in dollar terms in December 2008.
- 182 Presidency, 2008b, *Development Indicators 2008*, available at <http://www.info.gov.za/view/DownloadFileAction?id=84952>, notes at p. 7, for example, that foreign direct investment in the country is dominated by short-term flows and a limited number of long-term investments.
- 183 Factors include the relatively high cost of skilled labour, exchange rate volatility, unsettled labour relations, and high rates of crime, particularly violent crime.
- 184 Based on the narrow definition, which excludes some job-seekers
- 185 World Bank, 2009b.
- 186 The Gini coefficient increased from 0.64 to 0.69 from 2000 to 2005, according to the World Bank Country Brief. AMPS surveys reflect levels of 0.672 to 0.666 from 1993 to 2008, while IES results were 0.640 in 1995 and 0.679 in 2008. (Presidency, 2009c, *Development Indicators 2009*, available at http://www.info.gov.za/otherdocs/2007/development_indicators.pdf.)
- 187 Only 3.1% of income is shared by the poorest 20% of the population. (World Bank, 2009, *Country Data Profile for 2007*, as at 13 August.)
- 188 The country's ability to attain the Millennium Development Goals regarding poverty, hunger,

- child mortality and HIV/AIDS prevalence are “at risk”. In addition, the recent energy supply crisis has had a negative effect on the economy and has prompted a downward revision of growth projections.
- 189 Afrobarometer, 2009, Questions 10, 56, 57 and 58.
 - 190 Afrobarometer, 2009, Question 99.
 - 191 National Treasury, 2009, *Budget Review*, available at <http://www.finance.gov.za/documents/national%20budget/2009/review/default.aspx>.
 - 192 Inflation, while declining in the past year from 11.6% to 5.8%, remains above the Reserve Bank's target range of 3-6%. “Economic Policy and Outlook”, pg 26 Chapter 2 in National Budget Review 2009. Available at: <http://www.treasury.gov.za/documents/national%20budget/2009/review/chap2.pdf>.
 - 193 The government's priorities are identified in Presidency, 2008a.
 - 194 <http://www.euromonitor.com/pdf/exports-final.pdf>; SA Reserve Bank, 2009, *Quarterly Bulletin*, September.
 - 195 See <http://www.thedti.gov.za/econdb/raportt/rapstruc.html>
 - 196 SA Reserve Bank, 2009.
 - 197 See Presidency, 2009d, *Improving Government Performance: Our Approach*; and Presidency, 2009e, *Medium Term Strategic Framework: A Framework to Guide Government's Programme in the Electoral Mandate Period 2009-2014*, July.
 - 198 Constitution, 1996, section 195, “Basic values and principles governing public administration”.
 - 199 See, for example, IRIN, 2009, “South Africa: Violent protests worrying but not surprising”, Integrated Regional Information Networks, 23 July, available at <http://www.irinnews.org/Report.aspx?ReportId=85408>. The Afrobarometer 2009 survey confirms that basic services remain a primary concern for respondents.

POLITICAL FREEDOM AND DEMOCRACY

BY SHAMEELA SEEDAT¹

Over the past 15 years, South Africa has regularly been upheld internationally as a model of political freedom and democracy. This is even more pertinent given perceptions of Africa as a continent with one of the worst global records of ongoing human rights abuses, war and state interference in public life.

While the country's 1996 Constitution has consistently been praised – and emulated – as a modern, ultra-progressive and forward-looking framework for democratic government, its implementation has not been without problems. Some of these have been the result of conflicts around interpretation, some the result of gaps between theoretical ideals and practical applicability, some the result of problems around access, and others the result of either neglect or direct interference by government structures.

Particularly in the past few years, the Constitution has undergone major challenges, with its basic underpinnings coming under fire from some quarters for not addressing the “real” needs of an African polity. Fifteen years after the transition to democracy, various frameworks ranging from media policy to criminal justice are being questioned. As a developing country, South Africa has both to recognise a plurality of voices and interests and at the same time deal with difficult questions relating to redress and transformation. Conflicts around these needs suggest that the attainment of a culture of rights embraced by everyone for everyone is still a “work in progress”.

Significant concerns around high levels of private violence, crime and xenophobia continue, as do ones around the representativity of political parties and public participation in government and legal processes. Political interference with the public broadcaster has taken its toll, some government departments have clearly neglected constitutionalism in dealings with ordinary citizens, and there have been increasing concerns around the centralisation of power in the hands of the governing elite, especially where business and government interests overlap.

Yet the country's civil and political rights framework has continued, since 1994, to provide important guidelines for navigating the difficult transition processes themselves.

The indicators of effectiveness of a participatory democracy include civil and political rights, freedom of association, public participation, the ability of political parties to form and operate effectively, and freedom of media. How South Africa is dealing with these at the current important point of transition in government leadership will be considered in this section.

Civil and political rights

65. How free are all people from intimidation and fear, physical violation of their person, arbitrary arrest and detention? (4)

Section 12 of the Constitution guarantees the right to freedom and security of the person, prohibits torture and prevents arbitrary arrest and detention. Section 35 assures us that people accused of crimes are promptly charged, allowed contact with legal representatives or family members and detained in a manner “consistent with human dignity.” An Independent Complaints Directorate (ICD) and Judicial Inspectorate of Prisons (JIP) have been established to monitor violations by police and prison officials respectively.²

Notwithstanding such legal protections, several cases of violence and intimidation on the part of state actors – including the use of excessive force during arrest and detention – have been recorded by the ICD.³ The ICD in 2007-2008 received 5 380 complaints from the public, of which allegations of police brutality accounted for more than 50%. In the same period 792 cases of deaths in police custody and as a result of a police action were recorded, representing a 13% increase from 2006-2007 and a 28% increase from 2005-2006.⁴ Of these 792 deaths, 62% resulted from police action, with the remainder attributed to “natural causes” and suicides. Similarly, the JIP has received a number of complaints relating to assault and inhumane treatment of prisoners over the past years.⁵

While the ICD statistics are compelling, it should be noted that accurate figures would depend on the ICD’s access to alleged victims of police excesses, vulnerable members of society who may not always report such abuse.⁶ Even so, the number of recorded complaints, the proven cases of misconduct during arrest and custody, and the relatively high number of deaths over the past years suggest that police abuse remains a matter of urgent concern.

Apart from considering whether the state directly perpetrates harm against people within its borders, one needs also to assess the extent to which people in South Africa are free from fear and violence inflicted by private persons. In this regard, section 12 of the Constitution⁷ guarantees freedom from violence not only from public sources, but private ones too: here the picture is highly disconcerting.

Statistics show that crime poses a major threat to the enjoyment of people’s civil and political rights. The following table captures the levels of serious crime in South Africa from 2004-2005 to 2008-2009.

Table 4.1: Levels of serious crime^s

Crime category	Incidence of crime per 100 000 of the population					Increase/ decrease 2007-08 to 2008-09	Raw figures/frequencies					Increase/ decrease 2007-08 to 2008-09
	2004-05	2005-06	2006-07	2007-08	2008-09		2004-05	2005- 06	2006-07	2007-08	2008-09	
Contact crime												
Murder	40.3	39.5	40.5	38.6	37.3	-3.4%	18 793	18 528	19 202	18 487	18148	-1.8%
All sexual offences	148.4	145.2	137.6	133.4	146.9	10,1%	41 006	41 343	39 304	36 190	71500	12,0%
Attempted murder	52.6	43.9	42.5	39.3	37.6	-4,3%	24 516	20 571	20 142	18 795	18298	-2,6%
Assault with the intent to inflict grievous bodily harm	535.3	484.0	460.1	439.1	418.5	-4,7%	249 369	226 942	218 030	210104	203777	-3,0%
Common assault	575.0	485.3	443.2	413.9	396.1	-4,3%	267 857	227 553	210 057	198 049	192838	-2,6%
Robbery with aggravat- ing circumstances	272.2	255.3	267.1	247.3	249.3	0,8%	126 789	119 726	126 558	118 312	121392	2,6%
Common robbery	195.0	159.4	150.1	135.8	121.7	-10,4%	90825	74 723	71 156	64 985	59 232	-8,9%

While violent crime has decreased since 2001 – with contact crimes (including murder and rape) decreasing by 6.4% between 2006-2007 and 2007-2008 and 2.4% between 2007-2008 and 2008-2009,⁹ commentators correctly point out that related statistics have stabilised at a high level and that South African crime rates, particularly murder and rape, remain unacceptably high in international terms.¹⁰ The fact that during 2008-2009 approximately 2.1 million serious crimes were recorded illustrates this point.¹¹

Specifically, violence against children and women continues at an alarming rate. Sexual offences constituted 10.4% of total crimes in 2008-2009, demonstrating a 10.1% increase from 2007-2008.¹² According to a 2009 Medical Research Council survey, more than one in four men surveyed had raped a girl or woman.¹³ The government has put in place a range of legislation, specialised courts have been set up to deal with rape and sexual offences, and police officers have been trained to deal with rape complaints in a manner that upholds the Charter for Victims of Crime.¹⁴ The Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁵ was enacted in 2007 to widen the definition of rape, create new offences associated with sexual misconduct, and comprehensively address child prostitution. Despite these attempts, conviction rates for rape remain low – only 8.93% in 2007-2008.¹⁶

Law enforcement agencies such as the police, prosecutorial services and courts have a responsibility to deal with occurrences of violence and intimidation, but state efforts have generally not created public confidence in safety from such acts.¹⁷ Despite the important objective of the Firearms Control Act¹⁸ – to reduce the number of firearms in circulation – the high number in the hands of civilians remains a serious concern. It has not helped that senior politicians, including former President Thabo Mbeki, have at various times attempted to downplay the presence of violent crime in the country. President Zuma has recently underlined the need for “extraordinary measures” by police to reduce the “abnormal levels of crime” and plans to change the laws relating to arrest so as to make it easier for police to use force against dangerous criminals.¹⁹ Human rights groups have criticised this proposal on the grounds that it allows the potential for excessive force by the police which could also harm innocent bystanders.

Lastly, one of the most serious threats to human rights in South Africa has come in the form of xenophobia. Between May and June 2008 a widespread series of violent attacks rocked the country, threatening the emotional and physical safety of a large number of foreigners in the country. According to Human Rights Watch (HRW), at least 62 people died, 670 were injured and tens of thousands were displaced.²⁰ There were also numerous, if unconfirmed, reports of police involvement in the attacks. Many of the cases against attackers have been dropped due to a lack of evidence, and according to Human Rights Watch (HRW),²¹ illegal migrants were afraid to present evidence because they feared deportation.

In sum, South Africa does not possess a repressive state apparatus. While police abuse is a significant concern, the major setback to people’s freedom and security stems

from the high level of private violence and insufficient state capacity and capability to address it.

66. *To what extent are people able to protect themselves against discriminatory treatment by the state?* (6)

67. *To what extent are people able to use the legal system to protect their person and property against the state?* (6)

Discriminatory treatment

Section 9 of the Constitution prohibits unfair discrimination by both the state and private parties based on “race, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”²² Since 1994 there have been pertinent examples of private persons and organisations litigating against the state for discriminatory treatment, thereby invalidating official conduct or legislation.²³ In a landmark case, *Minister of Home Affairs v Fourie*²⁴, section 9 was used to recognise a constitutional right to same-sex marriage and to invalidate portions of the Marriage Act²⁵ for failing to uphold the right to equality for gay and lesbian people. Section 9 has also been used to extend social assistance to permanent residents, and has assisted immensely in advancing women’s rights through the courts: women have been granted new inheritance rights within African customary law and Muslim polygamous marriages, and can govern as chiefs if so chosen by their communities.²⁶

Given that discrimination represented the core of the previous apartheid system, South Africa has adopted special measures: the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) introduced equality courts to offer victims of unfair discrimination, harassment and hate speech simple, creative and affordable means of redress, specifically when compared to the costly and time-consuming processes of ordinary courts. In 2008-2009 approximately 445 equality cases were referred to the 219 equality courts, marking a significant increase from the 200 cases in 2007-2008.²⁷ Over 800 cases have been referred to these courts since their inception in 2003.

The Constitution further established the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (referred to as “Chapter 9 institutions”) to investigate discriminatory treatment in society and assist complainants in instituting equality-related cases.²⁸ The Office of the Public Protector addresses complaints of discrimination against government officials, and the Public Service Commission (PSC) deals with such complaints regarding public servants. Given their constitutional status, Chapter 9 institutions can play a fundamental role in promoting civil rights and in deepening democracy. The 2007-2008 Annual Report of the SAHRC notes that it received 593 complaints relating to equality in that period.²⁹

Person and property

Section 12 of the Constitution guarantees the right to freedom and security of the person. Arbitrary detention, torture and cruel, inhumane and degrading treatment

are expressly forbidden and everyone is assured of bodily and psychological integrity, which includes the right to make reproductive decisions. Cases so far brought to court include the validity of the death penalty, the detention of witnesses who had refused to answer questions regarding an insolvent estate and the extradition of a suspected terrorist without first obtaining the reassurance from the receiving state that the death penalty would not be imposed.³⁰

Unlawful interference by the state with a person's property is similarly prohibited. Section 25 of the Constitution seeks to protect existing property rights while simultaneously promoting access to land by previously disadvantaged South Africans through restitution, redistribution and tenure programmes. However, the section confirms that no one may be deprived of property except in terms of a "law of general application" and that "no law may permit arbitrary dispossession". Expropriation for "public purposes" is only permitted within the parameters of the Constitution and related land legislation and requires adequate compensation.

Concerns about property rights protection in South Africa have stemmed mainly from the imperative to transform landownership patterns inherited from apartheid. Amid criticisms that the government is moving too slowly, a draft Expropriation Bill³¹ was introduced in 2008 to give it more effective powers to expropriate land, primarily through abandoning the "willing buyer, willing seller" principle. The Bill proved controversial and was withdrawn. The government continues to face criticism relating to the slow pace of land reform.

Nevertheless, the courts retain the final power to decide matters pertaining both to property protection and to land reform, and have, for example, insisted that the state has a duty to take all reasonable steps to aid an individual holding a successful court order against illegal occupiers of his or her land.³² The courts have also reiterated that land reform measures must be undertaken in an "orderly" manner that maintains the "sanctity of the social fabric."³³

Extent of rights protection

Notwithstanding the legal protections mentioned above, the extent to which people can use the legal system to protect their rights ultimately depends on the accessibility of courts. Section 38 of the Constitution aims to widen access to courts by allowing class and public interest actions, thereby enabling civic organisations to litigate on behalf of marginalised communities.

The state also provides legal representation through the independent Legal Aid Board (LAB), which takes on approximately 400 000 new matters per annum on a "means basis" because of budgetary constraints.³⁴ However, the bulk of state legal funding goes to criminal cases (of the new cases received in 2008-2009, 90% were criminal and 10% civil) and funding for civil litigation – including rights infringements – is limited.

The high cost of professional legal services means that access to justice is limited to a tiny fraction of the population, despite the measure of relief provided by state legal aid and pro bono bodies described above. A Legal Services Sector Charter was

adopted in 2007 to enhance the LAB's ability to provide services to indigent persons and steps were taken to upgrade courts and also to construct new courts in rural and township communities.³⁵ Nevertheless major challenges persist, including the long distances people have to travel to access the courts, the prohibitive costs of obtaining lawyers and difficulties in receiving legal assistance from the LAB.³⁶

The equality courts have also not reached an optimal level of visibility and accessibility due to a number of obstacles (such as inadequate planning and training), and challenges persist in improving their functioning and increasing public awareness.³⁷

Although Chapter 9 institutions are meant to play an important role in the anti-discrimination framework, specifically by assisting poor people to access justice, a parliamentary committee in 2007 noted that these institutions faced serious challenges to their visibility, public accessibility and dynamism.³⁸ Apart from the fact that they do not have powers to enforce their recommendations, it has been argued that Chapter 9 institutions have not tackled rights violations adequately over the years.³⁹

In the first place, access to the legal system and Chapter 9 institutions depends on the possession of information and the knowledge that one may have a legal remedy.⁴⁰ In South Africa, prevailing levels of poverty and literacy hamper the advancement of human rights since rights protection continues to be linked to resources.

Finally, a legal provision has, until recently, violated the right of access to courts and equality before the law. Section 3 of the State Liability Act, 1957, provided immunity for the state in instances where a person sought the execution or attachment of state assets to secure payment of money owed to him or her. In effect this section shielded the state at the expense of citizens to whom the state owed money based on court judgments. In 2008 the court declared that section 3 was unconstitutional⁴¹ and ordered the government to amend the law within a stipulated time. At the time of writing a new law had not been enacted.⁴²

68. How effective and equal is the protection of the freedoms of expression, information and assembly for all persons irrespective of their social grouping? (6)

Freedom of expression – including academic, artistic and creative freedom – is guaranteed by section 16 of the Constitution. Free expression, however, is not absolute: there is no protection for “advocacy of hatred based on race, gender and religion”, “incitement of imminent violence” and “propaganda for war”.⁴³ Determining the exact parameters of free expression is a matter that continues to draw attention in South Africa. Recently, for example, critical debates relating to academic freedom on university campuses came to the fore.⁴⁴

The courts have emphasised that the right to freedom of expression is one of a “web of mutually supporting rights” linked to freedom of association and political rights.⁴⁵ Since the robustness of a country's media is a solid indicator of the levels of freedom of expression enjoyed by its citizenry, this matter is explored under “media rights” below.

South Africa's access to information legislation is expansive in scope: Promotion of Access to Information Act (PAIA) establishes mechanisms to access information from both public and private bodies, while allowing for a list of exceptions relating to state security, privacy and commercial interests. Although the cost of accessing information is reasonable,⁴⁶ the PAIA has not been as effective as originally intended. For one thing, while failure to comply with PAIA can result in legal action, this is costly and time-consuming.

Surveys reveal an unsatisfactory level of compliance with PAIA by both government and private bodies, as well as insufficient use of it by the public. In general, government departments reportedly take a long time to respond to requests, if they respond at all.⁴⁷ In a 2007 Open Democracy Advice Centre (ODAC) study, 21% of respondents said they had used the right of access to information, and 37.3% of those who had done so said that they had not received the information requested.⁴⁸ The PSC in 2008 also noted deficiencies in the capacity of the public sector to provide information, observing at the time that 44% of departments had not developed PAIA manuals as required by the Act.⁴⁹ In 2007-2008, 311 complaints relating to access to information were received by the SAHRC.⁵⁰

In order to improve the practical operation of PAIA, civil society bodies have advocated for an "information regulator" to facilitate disputes concerning the release of information and also to oversee the implementation of PAIA – a function currently exercised inadequately by the SAHRC due to lack of capacity.⁵¹

The freedom to assemble, including the right to demonstrate and picket, is guaranteed by section 17 of the Constitution, and primarily regulated by the Regulation of Gatherings Act 205 of 1993 (RGA). Since 1994 there have been thousands of protests registering dissatisfaction with government policies or service delivery – and such demonstrations increased in 2008 and 2009, amid the economic downturn.

While freedom of assembly is generally respected by the government – permission for the majority of the protest marches has been granted by local authorities – a 2005 report from non-governmental organisation (NGO), the Freedom of Expression Institute (FXI), noted various concerns. It concluded that organisations which had strongly criticised the government's economic strategy typically found it more difficult to get their marches approved by the local authorities, and that some protest marches were considered to be illegal because local authorities and police refused to acknowledge notification by the protestors as required by the RGA, claiming the right to exclusively "give permission".⁵² Aspects of this issue are explored further in Question 73 below.⁵³

Although the rights to freedom of expression, assembly and information legally apply to all social groupings, the accessibility and efficacy of enforcement bodies such as courts and Chapter 9 institutions shapes the actual enjoyment of such rights (see Questions 66 and 67 above). For the most part, socio-economic conditions continue to affect access in South Africa, and the protection of rights is generally weighted in favour of those with resources. Because of this, people living in rural areas, poor

immigrants, refugees and women (where their literacy rates are higher than men's) generally face greater difficulties in exercising and enjoying these rights.

Freedom of association and political participation

69. *How secure is the freedom for all to practice their own religion, language and culture?* (7)

Sections 15 and 30 of the Constitution contain key protective principles pertaining to religion, language and culture. Section 31 recognises that the rights to pursue diverse cultural practices and to use different languages are most meaningfully exercised in groups. As a transforming society, South Africa has had to face the conflict between multicultural recognition on the one hand and national identity formation on the other.⁵⁴ Participation in cultural life may only be done in a manner that does not infringe other constitutional rights, equality in particular.

In order to protect cultural, linguistic and religious diversity, government has adopted various policy and institutional measures.⁵⁵ The Constitution, for example, recognises African customary law and traditional leadership. Public schools are required to provide education in a pupil's official language of choice where reasonably practicable, and the Pan South African Language Board (PanSALB) promotes previously marginalised indigenous languages. The mandate of the constitutionally entrenched body, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (COPPRCLC), is "to promote respect for the rights of cultural, religious and linguistic communities ... on the basis of equality, non-discrimination and free association".⁵⁶

Several cases pertaining to cultural, religious and linguistic communities have been heard by the courts. Issues have included mother tongue instruction at public schools, the use of corporal punishment as a tenet of a specific religious faith, the rights of women to be chiefs in customary systems, and the consequences of smoking dagga as part of the rastafarian religion.⁵⁷ The courts have emphasized that "the protection of diversity is a hallmark of a free and open society"⁵⁸ and have had to balance egalitarian concerns against the associational rights of communities.

While there are no legal barriers that prevent people from observing cultural and religious practices, challenges to the proper enjoyment of these rights exist. Intolerant attitudes in some communities have undermined cultural diversity. Examples are language "fortresses" and prejudices against multilingualism (for example, where parents resist multilingualism being implemented at a school), the inadequate use of indigenous languages in public and private spheres, and the failure to legally recognise Muslim marriages despite a recommendation to this effect from the South African Law Commission.⁵⁹ In some quarters, there have also been complaints that minorities are not being adequately protected.

A further challenge is the lack of dynamism on the part of state-funded institutions such as PanSALB and the CPPRCRLC. However, the fact that the CPPRCRLC has not been particularly visible or relevant and has received few complaints from the public since becoming fully operational in 2004 may suggest that people do feel secure in the practice of cultural, religious and linguistic rights.⁶⁰ On the other hand, it could indicate that people do not feel confident in the ability of these institutions to secure their freedoms.⁶¹ Either way, a comprehensive monitoring system is needed. As some indication, the Afrobarometer surveys of 2006 and 2008 demonstrate relatively high levels of citizen involvement in religious organisations, with 39% of respondents stating that they are active members or leaders of religious groups.⁶² The SAHRC records investigating only four complaints relating to community rights in 2007-2008.⁶³

On the whole, South Africa appears to have made considerable progress in protecting religious, linguistic and cultural expression.

70. To what extent do people feel free to associate with others in order to influence government? To what extent does government action encourage or discourage people to associate with others in order to influence government? (7)

Since 1994, legal barriers that had previously prevented people from associating for political purposes have been removed. Sections 17 and 18 of the Constitution protect freedom of association and assembly respectively, creating rights for individuals to act in association with others for collective purposes. Civic organisations, trade unions and social movements remain an important feature of post-apartheid South Africa. The 2008 Afrobarometer Survey⁶⁴ indicates that 25% of respondents never, and 27% rarely, had to be careful of what they said about politics. This could suggest that the majority feel free to associate with others in order to influence government.

The extent to which government action encourages or discourages groups wanting to associate for political influence is more difficult to determine, but here one can look at the mechanisms that the government has adopted to facilitate such association, and also to government's response to actions aimed at influencing it.

To facilitate associations, government enacted the Nonprofit Organisations Act, 1997,⁶⁵ to regulate the formation and operation of civil society. In this framework, funding can be obtained from government, private or foreign sources. The government has attempted to formally draw associations into the policy-making framework by constitutionally obliging all three levels of government (national, provincial and municipal) to involve the public in law-making.⁶⁶

While public participation procedures have been adopted by all legislatures, there have been difficulties in putting them into practice. Participation has been relatively low over the years: the rise of "technocracy", the growing overlap of business and government interests, and a tendency in government to centralise decision-making have been put forward to explain the lack of confidence by ordinary people in formal participation processes.

Insufficient capacity and planning by South Africa's ten legislatures has also at times resulted in participation being a relatively unsystematic affair. The 2008 Independent Panel report noted that, despite constitutional imperatives, "[i]n recent years Parliament and Provincial Legislatures have been reprimanded by the courts and the press for not adequately allowing for public participation in legislative processes".⁶⁷

Furthermore, the 2008 Afrobarometer Survey shows that many South Africans do not believe that their views and concerns are taken into account by their representatives between elections, nor do they feel they can influence collective decision-making.⁶⁸ The same survey found that "citizens appear only moderately willing to attend community meetings" and have even less frequently "got together with others to raise an issue" or "attended a demonstration or protest march."⁶⁹

This perceived lack of impact may serve to discourage citizens from joining associations to influence politics. Even, for example, when extensive public participation has taken place, parliamentarians have demonstrated that on certain contentious issues – including recent decisions to terminate the elite crime fighting unit the Scorpions and to dismiss the former head of the National Prosecuting Authority (NPA), Vusi Pikoli – public input is unlikely to have an impact.

On the other hand, there is evidence that better-resourced organisations, or those regarded sympathetically by power-holders, are more likely to participate in, and have an impact on, government priorities. There have also been some notable exceptions to the generally limited participation of citizens in legislative issues,⁷⁰ usually in matters where either parliamentarians or civil society groups have made a special effort to ensure that the voices of the poor or otherwise marginalised are incorporated, or in matters that have attracted considerable national debate, such as gay marriages.⁷¹

While it appears that the majority of people do feel free to associate with others to influence government, in reality participation is limited to special interest and better-resourced groups.

71. To what extent do people organise themselves into associations in order to influence government and to what extent are the associations of civil society independent of government? (6)

Research on the ways in which and the extent to which people organise themselves into associations to influence government is inadequate. A large number of non-governmental and community-based organisations operate in South Africa. While social movements have become more active over the years, there is not enough evidence of their depth and growth potential.⁷² With an estimated membership of 1 985 380, the Congress of South African Trade Unions (Cosatu) is the largest civil society organisation.⁷³

Steven Friedman's chapter in Part 1 of this book reveals how large sections of society, particularly the poor, do not enjoy access to civil society because they lack the contacts, capacities and resources to participate.⁷⁴ Thus, despite the growth in social

movements, it appears that poor people remain outside of civil society and lack proper access to government.⁷⁵

It is difficult to gauge civil society's level of independence from government clearly. Since 1994, organisations have played both a complementary and adversarial role in relation to the state. On the one hand, they have been contracted by the state to assist in policy development or act as service delivery agents.⁷⁶ On the other hand, there are a number of bodies that regularly criticise government policies and offer alternative proposals. Some do both, depending on the organisation or issue.⁷⁷

The inevitable dependence of civil society on donor funding tends to ensure that they may shape strategic interests.⁷⁸ Many civil society groups have received significant assistance from the government for a long time, and have as a result been criticised for losing their independence. On the other hand, nonprofit organisations that receive foreign or local private funding have also been accused of biased agendas – an accusation made by former President Mbeki – or of not being answerable to marginalised sections of South Africa society.⁷⁹

Having conducted a comprehensive study on the non-profit sector in South Africa in 2002, Swilling and Russell did not think that government funding distorted their purposes and were fairly confident that government viewed them without suspicion.⁸⁰ Other observers are more critical. Research conducted by Idasa for United Nations Economic Commission for Africa (Uneca) in 2007 found that, in an expert sample, 27% of respondents felt that the government did indeed allow civil society to function independently of all organs of state and/or the ruling party, and a further 22% felt that civil society was largely independent in this regard. A sizeable 35% of expert respondents believed that the government only sometimes allowed civil society to function independently of all organs of state and/or the ruling party.⁸¹

72. How far do women participate in political and public life at all levels? (7)

Women's representation in political life is relatively strong: South Africa was placed third by the Global Ranking for Women in Parliament after the 2009 election.⁸² Under apartheid women constituted less than 3% of parliamentarians.

Today women make up 43.3% of MPs as compared to 32.8% after the 2004 election.⁸³ At provincial level, women constitute 42.4% of representatives. The majority of provincial premiers, five out of a total of nine, are women.

Women are well represented in the Cabinet, comprising a total of 41%, or 14 out of 34 ministers. Out of the 14 ministries headed by women, at least eight are in areas not traditionally associated with women, such as correctional services, defence, home affairs, international relations and co-operation, mining, public enterprises, and science and technology.⁸⁴

The number of female judges is relatively low despite a constitutional imperative to increase their representation and a government training programme for women

lawyers. At the time of writing, 42 of 206 judges are women, and there is no female High Court judge president.

Although female representation in public life is relatively strong outside rural areas, women are under-represented in the corporate world. The Presidency's 2009 Development Indicators show that women comprised 17.8% of South Africa's top managers and 27.8% of senior managers in 2008. The number of women in top managerial posts decreased from 21.6% in 2006 to 17.8% in 2008.⁸⁵

Moreover, unemployment rates for females remain higher than for males, and also reflect racial inequities prevalent across various racial groups. When aggregated according to race, it emerged in 2007 that among whites, 4.1% of men were unemployed while 4.6% of women unemployed; 11.3% of Indian men were unemployed, while 17.9% of Indian women were unemployed; the ratio among Coloureds is 16.9% and 17.9% respectively. The unemployment rate among Africans, particularly women, was the highest, as 25% of African men and 36.4% of African women were jobless.⁸⁶

73. *How free from harassment and intimidation are individuals and groups working to protect human rights?* (7)

The Constitution recognises that free assembly and expression⁸⁷ are necessary conditions for civic engagement with the state. Potential dilution of this legally assured space has been vigorously and successfully opposed by lobby groups: a draft "anti-terrorism" law that defined certain labour action as terrorist activity was, for example, radically amended as a result of public pressure in 2006.⁸⁸

Groups and individuals working to promote human rights are generally free from systemic state abuse. The accusations of harassment and intimidation that are made mostly involve the government's response to protest activity in terms of the Regulation of Gatherings Act, specifically involving "grassroots" organisations.⁸⁹ In 2004, for example, a shack-dwellers movement, Abahlali baseMjondolo, claimed that several of its members had been tortured and assaulted. A policeman was charged following an ICD recommendation, but a magistrate subsequently dismissed the case for lack of evidence.

Allegations of police brutality and harassment during protests, particularly against shack-dwellers and the Landless People's Movement, have continued in recent years. The FXI has argued that evidence of police violence during a protest in Protea South in 2007 revealed a worrying trend.⁹⁰ Instances of police misconduct against protesters was also reported in Durban before the 2009 election.⁹¹

While widespread harassment of human rights groups on a systemic basis has not been recorded in South Africa, anecdotal evidence of police abuse – specifically of people acting relatively directly to bring about change – remains a significant concern.

Political parties

74. *How freely are political parties able to form, recruit members and engage with the public?* (7)

Section 19 of the Constitution affords every citizen the freedom to make political choices and to engage in political activity. This includes the right to form a political party and recruit members, and to campaign for a party or a cause. A series of laws, including the Electoral Act, 1998 and Electoral Commission Act, 1996 give further expression to political rights. The Electoral Act incorporates an Electoral Code of Conduct aimed at creating a “climate of tolerance, free campaigning and open public debate”.

Party formation in South Africa is relatively unconstrained.⁹² In order to register, a party must obtain the signatures of 50 registered voters and pay a nominal fee (R500 in the 2009 election) to the Independent Electoral Commission (IEC).⁹³

A further fee is required to contest an election.⁹⁴ In 2009, this was R180 000 for parties contesting the national election and R40 000 per province for provincial elections. Although the fee to register a political party is nominal, the higher fee for contesting elections may have the effect of excluding smaller and financially weak parties from the election race.

Parties duly registered with the IEC are free to recruit members and hold meetings within the stipulations of the Constitution, electoral laws and the Electoral Code of Conduct. The 2008 Afrobarometer Survey suggests that 80% of respondents feel completely or somewhat free to join political organisations of their choice.⁹⁵ While research in the field is inadequate, the relatively high number of parties contesting the elections (25 at national level in 2009) would also suggest that freedom to recruit is strong in South Africa.

Nevertheless, several “no-go areas” have existed for both governing and opposition parties in past elections. In 2004, reports of intimidation surfaced in KwaZulu-Natal and a few other areas, but there was no report of large-scale political intimidation and the number of politically related deaths was small.⁹⁶ From mid 2008, the emergence of a new party, the Congress of the People (Cope), from within the ranks of the ANC and, to a lesser degree, the declining support for the Inkatha Freedom Party (IFP) in its former stronghold of KwaZulu-Natal led to acrimonious relations between the ANC and these parties, prompting interim President Kgalema Motlanthe to issue a call on leaders “to allow free political activity and stop intimidation”.⁹⁷ Yet although the Election Monitoring Network (EMN) observed and reported election-related violence, ranging from killings and intimidation to property destruction, it was generally pleased with the 2009 pre-election and post election period.⁹⁸

Notwithstanding the worrying presence of several “no-go” areas, as mentioned above, levels of political intimidation and violence have been relatively low in successive

elections, suggesting that South Africa's political environment is conducive to party formation, recruitment and engagement.

75. *How free are opposition or non-governing parties to organise within the legislature and outside of it?* (7)

Section 57 of the Constitution gives expression to the multi-party character of South Africa's democracy: it requires the participation of minority parties in the proceedings of the National Assembly and its committees in a "manner consistent with democracy". Parties are thus represented proportionally on each of the various committees. According to parliamentary convention, the chairperson of the Standing Committee on Public Accounts, the crucial financial oversight committee, is drawn from a non-governing party.

Several other processes assist minority party participation. Senior members of all parties are involved in compiling Parliament's timetable and in programming its meetings, and MPs from any party can submit legislative proposals.⁹⁹ "Question time" gives all parties an opportunity to put questions to the executive, and National Assembly debates have to involve the input of all the parties.

However, the extent to which these procedures realistically allow minority parties to influence Parliament is questionable. While Assembly debates offer speaking slots to all parties, the time allocated to each party is based on its numerical strength. So, for example, the United Democratic Movement (UDM), IFP and other smaller parties are allocated from one to three minutes in a typical 45-minute debate, while the ANC and Democratic Alliance (DA) receive about 25 and 10 minutes respectively. This hampers the ability of smaller parties to make substantive inputs.¹⁰⁰

Similarly, parliamentary question time has not offered sufficient opportunities for minority parties to gather information or demand accountability from the executive.¹⁰¹ Since 2002, questions to the executive have been entertained on a proportional basis rather than according to the order in which they were received. The effect is that minority parties receive a smaller share of the question slate. The 2008 Independent Panel Assessment of Parliament further noted that many opposition MPs regard question time as ineffective because of the lack of response, vague and insubstantial answers, or delays on answers to the point at which content becomes irrelevant.¹⁰² For example, out of the 11 043 questions asked of the executive during the third Parliament (2004-2008), 2 050 went unanswered.¹⁰³

While the chief whips of all parties play a role in compiling Parliament's programme through the Programming Committee,¹⁰⁴ the governing party, the ANC, retains the power to set the agenda since it holds the majority of parliamentary seats. Minority parties have no assurance that their issues will be included on Parliament's programme.¹⁰⁵ Commentators have, however, observed a degree of compromise on the part of the ANC in agenda-setting, and indeed motions from non-ANC MPs have at times been placed on the agenda.¹⁰⁶

Finally, a crucial means to assist party organisation both inside and outside the legislature is the provision of money by the state (in terms of the Public Funding of Represented Political Parties Act 103 of 1997) to parties represented in Parliament for the purpose of staffing, research and recruitment. Such funds are disbursed through the IEC according to a formula in which 90% of funding is allocated on the basis of numerical strength – thus favouring larger parties – and the remaining 10% shared equally among represented parties. Minority parties have argued that the formula should be readjusted because it results in the governing party being allocated the “lion’s share”, with smaller parties receiving a significantly smaller amount. Parties which do not already hold seats in Parliament do not qualify for public funds – and this was a particular complaint of the newly formed Cope before the 2009 election.

Parliament has incorporated a variety of procedures to assist minority party participation; but given the electoral dominance of the ANC, their ability to influence either Parliament or the executive is constrained in practice.

76. How fair and effective are the rules governing party discipline in the legislature and within the party? (5)

The nature of the electoral system plays a major role in determining the level of party discipline in any political system. The existence of a closed-list proportional representation system means that party discipline is very strict, that the system of caucus discipline is followed diligently by all parties, that chief whips ensure that party decisions are upheld, and that MPs seldom adopt positions different to those of their party.¹⁰⁷ Few dissidents emerge.¹⁰⁸ Party discipline is so entrenched that in some cases members of the National Council of Provinces (NCOP), the parliamentary chamber representing the provinces, have followed the party line even when this has been at odds with provincial interests.¹⁰⁹

Strong party discipline is probably similarly upheld in many other countries, but the enormous support enjoyed by the ANC in elections means that it can proceed with its policies without having to muster support from minority parties.¹¹⁰ This has the effect of limiting policy discussion in the parliamentary arena.¹¹¹ On the other hand, such discussion regularly takes place outside the parliamentary precinct and major policies are seldom implemented without debate, internal opposition and persuasion within the ANC, or between the ANC and its alliance partners.

A significant development in 2008 was the abolishing of the practice of floor-crossing, which had allowed MPs to move from their party to another without losing their parliamentary seats. The abolition of floor-crossing re-emphasised the dominance of parties over individuals in the electoral system, thereby maintaining strong party discipline. Floor-crossing proved to have overwhelmingly negative consequences, but, at least in theory, it provided an avenue for MPs who disagreed with party views to join another party.¹¹²

Because of the powerful hold of the party discipline system, and its effects on debate and accountability, there have been calls to alter the electoral system to make MPs

more accountable to constituencies. The 2008 Independent Panel Assessment of Parliament endorsed a mixed system to this effect, but there have been no moves towards reconsidering South Africa's electoral system.¹¹³

77. *How far are parties effective membership organisations, and how far are members able to influence party policy? Are all individual members privy to sufficient information about their party, including details of private donors?* (5)

Given the absence of a regulatory framework for internal party governance, parties are free to determine their own structures and arrangements.¹¹⁴ Party constitutions typically establish mechanisms for the election and discipline of leaders and the compilation of party policies.

The extent to which parties constitute effective membership organisations is difficult to gauge, but it is worth considering the influence that members have on the compilation of party lists and choice of office-bearers.¹¹⁵ In respect of all major parties, subnational structures play a role in the election of leaders, typically through nominations by local party branches. Despite this, party elites generally wield final power over list processes; a feature of the closed-list proportional representation system. Party elites may use their power to ensure representivity on the list (for example, seeing to it that lists contain more women or minorities), but could also use the opportunity to appoint people according to other purely political considerations.¹¹⁶

Most party constitutions do afford members an opportunity to shape party policies, for example by allowing them to freely take part in decisions in the work and the policy of the party or to populate bodies where policies are formulated.¹¹⁷ However, the actual power of ordinary members to influence policy continues to present challenges, and policy formulation remains a "top-down" activity for the most part. Specifically where party substructures are not functioning effectively or the balance of power within the party is weighted towards the party executive, the practical ability to influence or to criticise policy remains weak.

Various commentators have noted the tendency of political parties across the board to move towards a tighter, more centralised party organisation.¹¹⁸ While this may result in more efficient organisation, it also has the effect of increasing the distance between party leaders and their broader support base.¹¹⁹ To give one example, under the Mbeki administration, discontent with the centralisation of ANC policy within the Presidency, combined with the centralisation of government policy, led to opposition by various ANC members and a change in party leadership at its national conference in Polokwane in 2007.¹²⁰ At the same conference, members successfully changed the policy for the appointment of provincial premiers, so now party structures – rather than the President – hold the power to appoint premiers for each province.¹²¹

A major and long-standing point that highlights the lack of power among ordinary party members and the public is the fact that private funding of political parties remains unregulated. Because of this the public is unable to know which interests

shape the views promoted by party elites. Party members are privy to information relating to public funding, since political parties and candidates must disclose data relating to financing support and expenditures.¹²² In respect of private funding, however, there is no law imposing limits on donations to candidates, nor, despite strenuous lobbying by civil society, are there legal requirements for the disclosure of information or for the independent auditing of parties' finances and candidates.

Healthy party democracy would require ordinary members to be privy to information on the sources of party income, especially since private funding constitutes the bulk of a party's treasure trove.

78. To what extent are political parties able to aggregate the interests of all social groups? (6)

Most of the larger parties present themselves as “non-exclusionary” parties that represent a broad range of interests. Several parties receive regional¹²³ rather than national support or vie for the support of a specific religious or ethnic group,¹²⁴ but there are very few “single issue” parties.¹²⁵

The largest party, the ANC, is often described as a “broad church” comprising various ideological, race and class interests, although its support base is predominantly working class African people. The second-largest party, the DA, presents itself as an inclusive organisation but is largely perceived as reflecting mainly the interests of racial minorities.¹²⁶ Interestingly, commentators note that the overall trend suggests that more voters over time are becoming uncertain of the inclusiveness of many political parties.¹²⁷

Political parties continue to face challenges in aggregating the interests of all social groups, yet overall the proportional representation system allows for the representation of a broad spectrum of views. The system enables a plurality of competing parties and provides incentives for parties to incorporate minorities on their lists; the ANC, for example, has a quota for women. The relatively high voter turnout (76.7% in 2004 and 77.3% in 2009) and the number of parties (25 in the 2009 election at the national level) contesting the election tend to support the view that the political spectrum as a whole does cater for the interests of many social groups.

Media rights

79. To what extent does the legal system ensure that print and electronic media are free to print or say what they want about those in power in both government and the private sector? (7)

The 2008 Press Freedom Index published by Reporters Sans Frontières ranked South Africa 36th out of the 173 countries.¹²⁸ Media freedom and free expression are explicitly recognised as fundamental rights in section 16 of the Constitution.

Free expression, however, is not absolute – media bodies may not perpetrate “hate speech” or disrespect anyone’s rights to equality or dignity.¹²⁹

South Africa has enacted an array of legislation to facilitate free and independent media.¹³⁰ The unfettered legal environment for media is evident, for example, in the fact that the print media do not require a licence to operate,¹³¹ and in the case of electronic media (radio and television), where broadcasting licences are required, an independent body, the Independent Communications Authority of South Africa (ICASA), is tasked with ensuring that licences are granted to public and commercial radio and television stations according to independent, fair and transparent criteria.¹³² Self-regulatory bodies, including the Press Ombudsman, the Press Council of South Africa and the Press Appeals Panel serve to protect media freedom by providing a process to resolve editorial content-related complaints between media houses and the public. Vocal media watchdogs in civil society also help preserve media rights.

The Constitution has influenced media and defamation laws in a positive direction. Potential damage to reputation does not legally limit news reporting. Thus, for example, the courts have ruled that the media can escape liability for publicising untrue material as long as they can show that they made substantial efforts to check the accuracy of the information and the publication was reasonable in the circumstances.¹³³ Other court victories include a 2009 order to the Judicial Services Commission (JSC), the oversight body for judges, to allow the media and public to attend a misconduct hearing involving a senior judge,¹³⁴ and a judgment to the effect that a satirical T-shirt that parodied a brewery did not constitute a trademark violation.¹³⁵

Although a solid media framework has been constructed, section 205 of the Criminal Procedure Act 51 of 1957 – which allows journalists to be imprisoned if they refuse to reveal sources relating to a criminal investigation – is still in place. Another concern is the increasing resort by both government and private parties to court interdicts to halt the publication of information.¹³⁶ Politicians have also demonstrated their readiness to sue media houses for breach of privacy or defamation.¹³⁷ Between 2006 and 2008, when Jacob Zuma faced criminal charges, numerous lawsuits were brought against newspapers for defamation, and also against a cartoonist for allegedly belittling his reputation. In 2007, former Health Minister Manto Shabala-Msimang also (unsuccessfully) tried to persuade a court to interdict a newspaper from continuing to report on her alcohol consumption during a hospital stay on the grounds that it had acquired confidential medical records without her consent.¹³⁸

While government or political interests have sought to limit journalists’ freedom from time to time, it is argued that a major threat to a robust media is concentrated corporate ownership of news media and related financial reliance on corporate and government advertisements. In 2007, for example, a government Minister said that it was considering withdrawing advertising from the *Sunday Times* following its exposé on the then Health Minister, as described above. The government subsequently declined to withdraw advertising.¹³⁹

In recent years important debates relating to the parameters of media freedom in South Africa have increasingly come to the fore; some remain unsettled. The government, for example, was criticised for attempting to bring censorship through the “back door” via the Films and Publications Amendment Bill, 2006, by subjecting the print media to pre-publication approval.¹⁴⁰ Parliament ultimately refused to include this exact provision in the final version of the Bill passed in 2008, though some media organisations continue to point to faults in this legislation, as well as to potential threats from other draft laws.¹⁴¹

Debates around the “vision” of media entities, particularly the print media, have also proved controversial. The ANC touted the idea of establishing its own newspaper to “communicate to the people in an ANC way” and to counteract alleged media bias.¹⁴² Taking the view that the media was treating its president, Jacob Zuma, and party unfairly, the ANC in 2007 proposed a new Media Appeals Tribunal to adjudicate the balance between freedom of speech, on the one hand, and dignity and privacy on the other.¹⁴³ This drew strong criticism for potentially allowing politicians to interfere with media freedom, and the ANC abandoned its proposal, although some officials have indicated that this is not the end of the matter.¹⁴⁴ In sum, while media freedom is generally secure, the above-mentioned issues demonstrate that important questions relating to media freedom and policy continue to spark discussion.

80. *To what extent are people and organisations able to disseminate their views via print or electronic media?* (5)

The ability to disseminate views via print or electronic media generally depends on the reporting preferences of media entities, literacy levels and financial resources. Although there are over 400 newspapers and magazines targeting local communities,¹⁴⁵ a large component of the print media shows greater concern for urban issues while not paying similar attention to issues affecting poorer or marginalised communities.¹⁴⁶

In order to promote access to the media by historically disadvantaged communities, in 2002 South Africa established the Media Development and Diversity Agency (MDDA).¹⁴⁷ Supported by the MDDA, community media has grown, particularly radio, and has increased the diversity of voices in the broadcast sector. In 2007-2008, for example, ICASA received 3 800 new applications for radio licences, and many community radio stations carry specialised programming targeting women and children.^{148 149} Nevertheless a significant setback to the goal of increasing the diversity of media sources is the fact that community radio and print media face difficulties in accessing financing.¹⁵⁰

The potential for self-dissemination through the internet is limited in South Africa. In 2009 only 10.9% of people had internet access, and broadband subscribers constitute as small a proportion as 0.35%.¹⁵¹ On the other hand, mobile phone use is increasing rapidly¹⁵² – 72.4% of people in 2009¹⁵³ – and is potentially an important tool for self-dissemination.

On the whole, diversity of voices in media is generally lacking: marginalised groups including refugees, disabled people, the poor and rural women face significant difficulties in disseminating their views.¹⁵⁴

81. *To what extent are the print and electronic media independent from government? How pluralistic is the ownership of print and electronic media?* (6)

The ownership of the print sector is characterised by a high degree of concentration in four large corporations¹⁵⁵ that own all the major newspapers in the country, with a few exceptions. Print media ownership is not regulated by law except that all media companies are subject to competition laws limiting monopolies and cross-media ownership.¹⁵⁶ The print media in South Africa is independent of government.

Given apartheid disparities, the level of racial diversity in print media ownership continues to attract attention. Commentators have noted racial changes in ownership in recent years, yet it remains a monopolised industry.¹⁵⁷

The position with regard to the independence of the electronic media, specifically television, differs from that of the print media. The public broadcaster, the South African Broadcasting Corporation (SABC), is the major owner of the free-to-air television stations, owning three out of four, and enjoys a large audience (for example, in 2008 SABC1 attracted approximately 22 million adult viewers in a seven-day period).¹⁵⁸

The SABC also dominates the national radio spectrum.¹⁵⁹ On the other hand, community radio is growing, with an audience in 2009 estimated at 5.81 million per week,¹⁶⁰ and is among the most diversely owned media in South Africa. The government has stipulated that by 2015, 15% of broadcast licences should be black-owned.

Recently troubling questions relating to both the independence and the financial management of the SABC have come to the fore. Although the Broadcasting Act, 1999,¹⁶¹ guarantees the independence of the SABC (which must “present news and programmes that serve the public interest”) and the SABC Charter protects “journalistic, creative and programming independence”, there has been a significant gap between what the law stipulates for the editorial independence of the SABC on the one hand and various actions by the SABC on the other.

In 2006 a storm broke out when the SABC was accused of having a politically motivated “blacklist” to exclude controversial commentators, primarily those critical of then President Mbeki. The then head of SABC News was accused of blatantly favouring Mbeki, and the SABC also refused to air a documentary about Mbeki in 2007.

An independent panel appointed by the SABC, the “Sisulu Commission”, confirmed the existence of this blacklist in 2007. The SABC attempted to block the release of the commission’s report.¹⁶² To date none of the recommendations made in the Sisulu report have been implemented by the SABC, and ICASA has declined to intervene in the “blacklisting controversy” on the basis that it did not have jurisdiction.¹⁶³ Difficulties in the public broadcaster percolated to radio too. A well-known presenter

claimed that he had been “pressurised” into leaving SABC radio after taking a stand against what many observers called the “political antics” of the SABC.¹⁶⁴

There have further been concerns that changes to the ICASA Act in 2006 may have opened the door to political interference in the broadcast sector regulatory authority. A 2006 amendment¹⁶⁵ changed the manner of appointment of ICASA’s seven councilors so that while Parliament appoints an independent selection panel to recommend names, it is the Minister of Communications who chooses from among these and presents the selection to Parliament for approval or veto. Some commentators argue that this arrangement vests excessive powers in the Minister, despite the fact that the ICASA Act guarantees against political or commercial interference.¹⁶⁶ On the other hand, others have argued that the Act contains adequate safeguards.

Recently, ICASA’s independence was questioned when it intervened, in a last-minute apparent about-turn, to support Cosatu’s legal application to prevent the sale of the cellular network “Vodacom” to the UK-based Vodafone.^{167, 168} When ICASA appeared before Parliament, the committee chairperson asked why ICASA had experienced such a dramatic change of heart and teamed up with Cosatu in the court action, even though it was initially in support of the sale.¹⁶⁹

Along with a significant downturn in public confidence in the SABC during this period, 2009 saw a near collapse of the broadcaster. The 12-member SABC Board,¹⁷⁰ which has the official role of promoting programming in the public interest, oversaw poor decision-making and financial management, and was eventually dissolved. A new board was appointed in 2009 following a robust public participation process.

In the period ahead, the independence and viability of the SABC will come under intense scrutiny. The SABC remains a controversial entity and faces significant challenges in regaining public confidence in its overall operation. If one had to evaluate the independence of the SABC on its own it would receive a score of 4.

82. To what extent do citizens have equal access to information, including news and other media? (6)

South Africa has a variety of news sources – broadcast, print and internet. Radio is the most utilised, affordable and linguistically diverse medium, with approximately 10 million radio sets in South Africa.¹⁷¹ The public service radio stations offer services in all 11 official languages.¹⁷²

SABC television is also a major source of news and information, and accommodates a diversity of languages, including sign language. A 2009 MDDA report notes that all official languages are represented to certain degree in the media, although English is predominant, followed by Afrikaans.¹⁷³

However, the percentage reach of South African newspapers remains very low. In 2008 it was estimated that fewer than one in five adults read newspapers.¹⁷⁴ On the other hand, the tabloid print market has grown impressively in recent years and has

increased access to information to a wider audience, particularly the black working class. For example, in 2009 the *Daily Sun* sold 513 291 copies a day.¹⁷⁵

While there are no legal restrictions on accessing local or international media, illiteracy, the cost of access to print and broadcast media, the fact that the majority of large newspapers are in English and the dearth of newspapers in rural areas all obstruct equal access to news and information.¹⁷⁶

Conclusion

South Africa's constitutional framework entrenches political freedoms by protecting freedom of expression and assembly, as well as the rights of participation in political parties and in civil society. This framework recognises the importance of open and robust debate, tolerance, appreciation of diversity and respect for individual and group rights as fundamental not only to constitutional democracy, but also to individual human development. The Constitution affirms the role of the courts, and establishes bodies, including the Chapter 9 institutions, to help protect political rights. Over the past 15 years, the government has also introduced specific policies and programmes to give greater expression to political freedoms. Any analysis of the country's progress in implementing political rights must, however, include an inquiry into whether the constitutional vision of democracy has indeed been realised in substantive terms.

A few conclusions can be drawn from this analysis. First is the oft-repeated point that while political freedoms are constitutionally guaranteed for all, and while people feel freer to engage in politics than ever before, in reality the enjoyment of these rights continues to be impaired by prevailing social and economic inequalities. Poor or otherwise marginalised people face greater difficulties in accessing the courts, media, Parliament, civil society bodies and Chapter 9 institutions than those who are better off, and the dichotomy between *having* rights and being able to *exercise* them persists. Furthermore, high levels of private violence and xenophobia substantially impede the enjoyment of civil and political rights of all people in the country.

Secondly, formal structures associated with political freedoms have not always been supported by constructive government action. While free assembly, for example, is protected by the Constitution, there is worrying evidence of police inaction in addressing the concerns of legal protestors and grassroots organisations. Broadly speaking, legislatures and the government have not successfully encouraged or facilitated public participation in decision-making, notwithstanding some positive engagement in this regard. Political parties have given insufficient attention to internal party governance arrangements, thereby diluting the voices of ordinary party members in policy and party affairs. The lack of transparency in the private funding of parties has also had the effect of hiding from the public the influence of business and other powerful interests on government decisions.

Thirdly, a number of institutions integral to the protection of civil and political rights have performed inadequately recently and now face the task of regaining public confidence in their operations. This should in part be seen in the context of the ANC leadership contest between Mbeki and Zuma (especially from 2007 onwards), which resulted in huge pressure on the media, the courts, the national prosecution service, the intelligence agency and various other state institutions. The SABC, for example, which as the public broadcaster should play the important role of providing information to assist people in making political choices, proved susceptible to political interference during this period of political turmoil. It virtually collapsed in 2009 and remains a controversial entity (also because of alleged large-scale mismanagement and corruption). Nonetheless, the print media continue to be independent and robust.

Amid these problems, the Constitution has continued to provide a framework for navigating critical questions, and it is significant that various important victories have been won in the courts. An interesting spin-off from the recent political tumult, however, has been a reopening of debate on political rights that had previously seemed secure, such as the rights of gay people, the legally accused and criminals, and also on the parameters of media freedom. In some quarters, there have even been increasing concerns that civil and political rights are threatened by socially conservative elements in the ruling party and associated with the “Zuma camp”.

Given that South Africa is a young democracy which does not enjoy the benefit of a long, stable tradition of commonly accepted rights, such debates are not surprising. Yet it is important to highlight that the ANC remains a party representing a plurality of interests, and one that is open to debate and internal persuasion by its alliance and other partners. Despite various challenges (in particular access by the poor), civil society remains a vocal presence. Propositions from socially conservative elements are generally thoroughly interrogated across society, and there is – at least for now – no indication that they will ultimately carry the day. Importantly, the much-celebrated fluidity of South African politics at this juncture may well present novel opportunities for using the right to free expression and assembly in order to influence government policies.

Political rights remain highly relevant in South Africa: they are integral to constitutional democracy not just for their own sake but also in terms of promoting equality in new areas. Freedom of expression and assembly enable people and organisations to advocate for important policy changes and for concrete social improvements. But given that South Africa’s democracy remains relatively fragile, it is essential to the maintenance of these rights that key institutions such as the courts and Chapter 9 institutions be run independently and progressively and allow the widest range of citizens access. In such an environment, citizens, civil society, political parties, media and the courts can create a critical dialogue which will help shape government priorities and bring South Africa closer to realising the hopes awakened in 1994.

ENDNOTES

- 1 I would like to express my sincere appreciation to my colleague Edvard Mitevski for his invaluable assistance with research and referencing. I would also like to thank Professor Herman Wasserman for his interesting and insightful comments on the questions concerning media rights.
- 2 See also the Criminal Procedure Act 51 of 1977, the Correctional Services Act 11 of 1998, and section 53(2) of the South African Police Service Act 68 of 1995, which sets out the mandate of the ICD and locates it within the Department of Safety and Security.
- 3 ICD, 2008, *Annual Report 2007/2008*, Independent Complaints Directorate, available at <http://www.icd.gov.za/documents/2008/icd-annual-%20rpt0708.pdf>, cites several cases where excessive force was used by police during arrest, interrogation and detention. The South African Human Rights Commission received 620 complaints from arrested, detained and accused persons in 2007-2008. (SAHRC, 2008, *Annual Report April 2007-March 2008*, South African Human Rights Commission, Annexure A, p.135.)
- 4 Deaths in police custody increased by 8% between 2006-2007 and 2007-2008, while the number of deaths as a result of police action increased by 17%. See ICD, 2008, pp. 53-57.
- 5 JIP, 2009, *Annual Report 2008/2009*, Judicial Inspectorate on Prisons, pp. 35-36, available at <http://judicialinsp.pwv.gov.za/Annualreports/Annual%20Report%202008%20-%202009.pdf>.
- 6 D. Bruce, 2003, "Gripes or grievances? What the ICD statistics tell us (or not)", *SA Crime Quarterly*, no. 4, June.
- 7 The Constitutional Court has recognised the positive dimensions of section 12. In *S v Baloyi* 2002 (2) SA 425 (CC) the Court said: "The specific inclusion of private sources emphasises that serious threats to the security of the person arise from private sources ... Section 12 has to be understood as obliging the state directly to protect the rights of everyone to be free from private or domestic violence". See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
- 8 SAPS, 2009, *2008/2009 Annual Report*, South African Police Service, p. 5, available at http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/2008_2009/2_crime_situation_sa.pdf.
- 9 SAPS, 2009, p. 12.
- 10 See various commentators referred to by Christina Murray and Anashri Pillay, 2005, "Equality and democracy: Are civil and political rights for all guaranteed?" in Richard Calland and Paul Graham (eds) *Democracy in the Time of Mbeki*, Idasa, p. 197; and D. Bruce, 2003.
- 11 According to SAPS, 2009, of those 2.1 million crimes, 32.7% (685 185 cases) were contact crimes, 26.3% other serious crimes, 25.4% property-related crimes, 8.9% crimes dependent on police action for detection and 6.7% contact-related crimes.
- 12 SAPS, 2009.
- 13 According to the policy brief, 27.6% of the men surveyed had raped a girl or woman and 4.6% had raped within the past year. Source: Rachel Jewkes, Yandisa Sikweyiya, Robert Morrell and Kristin Dunkle, 2009, *Understanding Men's Health and Use of Violence: Interface of Rape and HIV in South Africa*, June, Medical Research Council, available at http://nicborain.files.wordpress.com/2009/06/men_exec_smry1.pdf.
- 14 Department of Justice and Constitutional Development, 2008b, *Service Charter for Victims of Crime*, available at <http://www.npa.gov.za/files/Victims%20charter.pdf>.
- 15 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- 16 Dianne Kohler Barnard, 2008, "Conviction rate for murder 12.6%", statement issued by a Member of Parliament for the DA, 19 September, available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=103677&sn=Marketingweb%20detail>.
- 17 Conviction rates for 2007-2008 are as follows: murder, 12.60% (a decrease of 0.82% since 2006); attempted murder, 11.31% (a decrease of 0.59% since 2006); rape, 8.93% (a decrease of 0.07% since 2006); house robbery, 7.76% (a decrease of 1.72% since 2006) and carjacking, 7.29% (a decrease of 2.36% since 2006). (Source: Dianne Kohler Barnard, 2008.)
- 18 Firearms Control Act 60 of 2000.
- 19 SAPA, 2009r, "Zuma backs more power for police", *Mail & Guardian*, 29 September, available at <http://www.mg.co.za/article/2009-09-29-zuma-backs-more-power-for-police>. This proposed change to criminal procedure laws has attracted a range of criticism.
- 20 HRW, 2008a, "South Africa: Protect victims of xenophobic violence", Human Rights Watch, 5 June, available at <http://www.unhcr.org/refworld/docid/484cee94c.html>.

- 21 Government intervention is needed to encourage witnesses to come forward and provide evidence. See HRW, 2008b, "South Africa: Punish attackers in xenophobic violence", Human Rights Watch, 22 May, available at <http://www.hrw.org/en/news/2008/05/22/south-africa-punish-attackers-xenophobic-violence>.
- 22 Section 9 has both a formal and a substantive dimension, which means that the actual consequences of laws and rules, and not just their content, will be considered. Section 9 permits affirmative action measures. For the test used by the Constitutional Court to determine whether the impugned conduct constitutes "unfair discrimination", see *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).
- 23 Examples include *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *Jordan v S* 2002 (6) SA 642; *Khosa & Others v Minister of Social Development* 2004 (6) SA 505 (CC).
- 24 *Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs*, 2006 (1) SA 524 (CC).
- 25 Marriage Act 25 of 1961.
- 26 See *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); *Fatima Gabi Hassam v John Hermanus Jacobs NO* (July 2009) (CC); *Bhe and Others v The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* (2004); *Shilubana and Others v Nwamitwa* (CCT 3/07).
- 27 Zolile Nqayi, 2009, "Equality Courts are not closing down", statement issued by Department of Justice and Constitutional Development, 10 July, available at <http://www.info.gov.za/speeches/2009/09071016051001.htm>.
- 28 The SAHRC also has the role of monitoring the implementation of PEPUDA and the implementation of South Africa's access to information legislation, PAIA.
- 29 SAHRC, 2008, Annexure A, p.135.
- 30 *S v Makwanyane* 1995 (3) SA 391 (CC); *Ferreira v Levin NO and Others v Powell NO and Others* 1996 (1) SA 984 (CC); *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); *Mahomed and Another v President of RSA and Others* 2001 (3) SA 893; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).
- 31 Expropriation Bill, 2007, published in *Government Gazette* No. 30468, 13 November.
- 32 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).
- 33 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
- 34 The LAB received R668 978 667 in 2008-2009. (LAB, 2008, *Annual Report 2007/2008*, Legal Aid Board, available at <http://www.pmg.org.za/files/docs/080520lab-edit.pdf>.)
- 35 Law Society of South Africa, 2007, *Legal Services Sector Charter*, Department of Justice and Constitutional Development, December, available at http://www.doj.gov.za/LSC/LSSC_Dec%2007.pdf. Justice Minister Jeff Radebe announced plans to expand the court system in his Budget Vote speech on 24 June 2009, available at <http://www.info.gov.za/speeches/2009/09062414251001.htm>.
- 36 Jacob Zuma, 2009, "Access to justice in a democratic South Africa", lecture, 9 September, available at <http://www.anc.org.za/ancdocs/history/zuma/2008/jz0909.html>.
- 37 Notably, in 2009 the Department of Justice reiterated that it was embarking on publicity campaigns to increase the public's awareness of the equality courts. See also Shameela Seedat, Ronke Bamiduro and Luzelle Adams, 2005, *Equality Courts*, a report by PIMS-SA, Idasa, available at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1352>.
- 38 Ad Hoc Committee on State Institutions Supporting Democracy, 2007. Report issued by parliament of South Africa.
- 39 For example, the Aids Law Project complained that the SAHRC failed to tackle human rights violations with urgency, to intervene in politically charged cases or to use its powers of subpoena and did not hold the government fully accountable. (PMG, 2007, "Ad hoc Committee on the Review of Institutions Supporting Constitutional Democracy," minutes, available at <http://www.pmg.org.za/minutes/20070222-aids-law-project-f-w-de-klerk-foundation-cosatu-open-democracy-advice-desk-idasa-su>. Others have argued that more attention should be given to socio-economic rights shortfalls in education and health.
- 40 G. Budlender, 2003, "Access to courts", background paper, Judicial Exchange on Access to Justice, Mumbai, India, 14-16 November, Commonwealth Human Rights Initiative, available at http://www.humanrightsinitiative.org/jc/papers/jc_2003/background_papers/Budlender_Access%20to%20courts.pdf, cited in Murray and Pillay, 2005.
- 41 For example, a person who had successfully sued a public hospital for negligent treatment which had left him paralysed had no means to enforce a court order that the state pay him damages. In *Nyathi v MEC for Health, Gauteng and Another* 2008 (5) SA 94 (CC), the Constitutional Court declared that section 3 of the State Liability Act was unconstitutional, and ordered the government to change the law within a specified time frame. The government went back to court to extend this time frame, and it was extended to 31 August 2011. The

- court also granted an interim remedial, which allowed for a tailored attachment and execution procedure.
- 42 A justice department draft amendment fell short of allowing the attachment of state assets to satisfy judgment debts.
 - 43 Section 16 of the Constitution, 1996, contains these three internal limitations. Free expression is also subject to the general limitation clause in section 36. See also Pepuda, which bans hate speech in terms of civil law.
 - 44 SANEF, 2008, "SANEF worried over freedom of expression at UKZN", press statement, South African National Editors Forum, 12 November, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=109636&sn=Detail>.
 - 45 *SANDF Union v Minister of Defence* 1996 (6) BCCR 615 (CC). Note also that the SAHRC head office investigated three complaints relating to freedom of expression in 2007-2008. SAHRC, 2008, Annexure A, p. 135.
 - 46 For reproduction and other fees, see <http://www.services.gov.za/ServicesForPeople/informationfromgovernment/accesstoinformation.aspx?Language=en-ZA#Cost>.
 - 47 A commentator has even noted that "the PAIA is so misunderstood in government circles that officials deny applications for fear of disclosing more than they ought to" Alison Tilley in *Global Integrity*, 2008.
 - 48 ODAC, 2007, "Whistle-blowing, the Protected Disclosures Act, accessing information and the Promotion of Access to Information Act: Views of South Africans", 34-39. Available at <http://africafoicentre.org/index.php?option=comdocman>
 - 49 PSC, 2008b, "Report on the implementation of Batho Pele principle of openness and transparency in the Public Service", Public Service Commission, available at http://www.psc.gov.za/docs/reports/2008/K-6300_PSC_Report%20Batho%20Pele%20Principals_Low%20res.pdf.
 - 50 SAHRC, 2008, Annexure A, p. 135. The SAHRC has the official mandate to monitor the implementation of PAIA. Civil society bodies have criticised its track record here.
 - 51 This proposal has been tabled, according to Alison Tilley of ODAC in an interview in October 2009.
 - 52 FXI, 2006a, "First progress report to Open Society Foundation of South Africa (August 2005 to July 2006)", Freedom of Expression Institute, available at <http://www.fxi.org.za/PDFs/ACP/Reports/ACP%20progress%20report-Jan2006.pdf>. FXI's study of the government's response to protest activity covered the period 2000 to 2005.
 - 53 Note that the 2007-2008 SAHRC report contains no record of complaints relating to freedom of assembly on its own.
 - 54 For a historical discussion on the adoption of the cultural rights provisions in the Constitution, see S. Woolman, T. Roux and M. Bishop (eds), 2007, *Constitutional Law of South Africa* (2nd edition), Juta.
 - 55 These include policy papers on arts, culture and heritage, the recognition of traditional or religious norms (for example, the Recognition of Customary Marriages Act 120 of 1998) previously degraded by apartheid and the establishment of a national House of Traditional Leaders to advise the national government.
 - 56 Constitution, 1996, section 185.
 - 57 *Prince and Others v Law Society of the Cape of Good Hope* 2005 (1) BCLR (CC) 1; *Lawrence v Nigel* 1997 (4) SA 1176 (CC); *The Western Cape Minister of Education and Others v The Governing Body of Mikro* 2006 (1) SCA 2005 (10) (BCLR) 973, *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC).
 - 58 See *Prince and Others v Law Society of the Cape of Good Hope* 2005 (1) BCLR (CC) 1.
 - 59 Tseliso Thipanyane, 2006, "Cultural, religious and linguistic rights", in SAHRC, *Reflections on Democracy and Human Rights*, South African Human Rights Commission; *Women's Legal Trust v President of the Republic of South Africa* CCT 13/09, July 2009.
 - 60 Murray and Pillay, 2005, p. 197.
 - 61 Murray and Pillay, 2005, p. 197.
 - 62 Afrobarometer, 2006, 2008.
 - 63 SAHRC, 2007, Annexure A, p. 135.
 - 64 Afrobarometer, 2008.
 - 65 Nonprofit Organisations Act 71 of 1997.
 - 66 Constitution, 1996, section 59.
 - 67 Independent Panel, 2008. See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) and *Matatiele Municipality & Others v President of the RSA & Others* CCT 73/05 27 February 2006. In *Doctors for Life* the court found that "Parliament and the provincial legislatures have a broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case", but that it must be exercised reasonably.
 - 68 Afrobarometer, 2008.
 - 69 Afrobarometer, 2008.
 - 70 These include the processes around drafting the Child Justice Bill and hearings on the Firearms Control Bill and on legislation introducing unemployment insurance for domestic and farm workers. Significantly, in the 2006 *Doctors for Life* case, the Constitutional Court invalidated four pieces of legislation on the grounds that there had not been sufficient public participation in the law-making process. Extensive public hearings were held during 2006 on proposed legislation to enable gay and lesbian couples to enter into civil unions.

- 71 Unpublished expert survey, conducted by Idasa for the United Nations Economic Commission for Africa (UNECA) in 2007.
- 72 S. Friedman, nd, "Beneath the surface: Civil society and democracy after Polokwane," unpublished paper.
- 73 Politicsweb, 2009, "Cosatu's membership," May, available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=130402&sn=Marketingweb+detail>.
- 74 S. Friedman, nd.
- 75 S. Friedman, nd.
- 76 Adam Habib, 2005, "State-civil society relations in post-apartheid South Africa", *Social Research*, vol. 72, no. 3, p. 685, available at http://aapf.org/wp-content/uploads/Habis_Reading_2.pdf.
- 77 Adam Habib, 2005, p. 685.
- 78 S. Friedman, nd.
- 79 Adam Habib, 2005, p. 680.
- 80 M. Swilling and B. Russell, 2002, *The Size and Scope of the Non-Profit Sector in South Africa*, Durban: Centre for Civil Society, University of Natal, p. 90.
- 81 Unpublished expert survey, conducted by Idasa for United Nations Economic Commission (UNECA) in 2007.
- 82 South Africa is behind Rwanda (56%) and Sweden (47%) in global parliamentary rankings. (SABC News, 2009, "SA soars to 3rd place in global women in Parliament ranking," 29 April 29, available at <http://www.sabcnews.com/portal/site/SABCNews/menuitem.cfe7d3eef5cd31a5a707a707674daeb9/?vgnextoid=e1295500042f0210VgnVCM10000077d4ea9bRCRD&vgnextfmt=format%20&orderListkeyId=07fae9327219d110VgnVCM10000072d4ea9bRCRD&articleId=e1295500042f0210VgnVCM10000077d4ea9bRCRD>.)
- 83 Presidency, 2009c, p. 53.
- 84 Gender Links, 2009, "New cabinet and elections full of mixed blessing for gender activists", available at <http://www.genderlinks.org.za/article/for-immediate-release-new-cabinet-and-elections-full-of-mixed-blessing-for-gender-activists-2009-05-11>.
- 85 Presidency, 2009c, p. 19.
- 86 Naledi, 2008, *Bargaining for a Living Wage, annual report on bargaining*, National Labour and Economic Development Institute, p.15.
- 87 Constitution, 1996, sections 16 and 17.
- 88 See early version of Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.
- 89 FXI, 2006b, *Annual Report 2005/2006*, Freedom of Expression Institute, available at <http://www.fxi.org.za/PDFs/Governance/FXIAnnualReport2006.pdf>. The report also contains more information on police brutality, harassment and banning of protests.
- 90 FXI, 2007, "Police repression in Protea South an indicator of a national trend", Freedom of Expression Institute, September, available at <http://www.fxi.org.za/content/view/138/51/>.
- 91 Steven Friedman, 2009, "Acid test for ANC's commitment to democracy," *Business Day*, 7 October, available at <http://www.businessday.co.za/articles/Content.aspx?id=83317>.
- 92 T. Lodge and U. Scheidegger, 2006, *South Africa: Country Report Based on Research and Dialogue with Political Parties*, International Institute for Democracy and Electoral Assistance, p. 7, available at <http://www.idea.int/parties/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=15063>.
- 93 EISA, 2006, "Promoting credible elections and democratic governance in Africa", Electoral Institute of Southern Africa, available at <http://www.eisa.org.za/WEP/souparties1.htm>.
- 94 Such parties can be refused registration if that would cause "offence to any section of the population on the grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language" (Electoral Commission Act, 1996).
- 95 Afrobarometer, 2008, p. 9.
- 96 J. Piombo, 2004, "Politics in stabilizing democracy: South Africa's 2004 elections", *Strategic Insights*, vol. 3, no. 5, May, available at <http://www.nps.edu/Academics/centers/ccp/publications/OnlineJournal/2004/may/piomboMay04.html>.
- 97 Idasa, 2008, "Call to enforce Electoral Code of Conduct", press release, 29 October, available at http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D1632%26oplang%3Den%26OTID%3D42%26PID%3D63.
- 98 EMN, 2009b; see also other EMN articles, 2009, available at: http://www.idasa.org.za/index.asp?page=programme_details.asp%3FRID%3D75.
- 99 Private members' Bills remain important tools for members to raise political concerns, but few have been processed.
- 100 It is worth noting that the ANC has established a practice of allocating a proportion of its speaking time in debates to minority parties (National Assembly, 2004, *Guide to Procedure*, Parliament of the Republic of South Africa, available at <http://www.parliament.gov.za/content/GUIDE.pdf>).
- 101 Between 1994 and 2000, question time incorporated three mechanisms – interpellations, questions for oral response and questions for written reply. Changes were made in 2000: interpellations were suspended and the allotted period for question time was extended from 30 minutes to two hours. In 2002, the system for question time changed further and the rotational system was abandoned.

- 102 In addition, the report suggests that the deficiencies in the operation of question time pose issues of great concern that "may corrode the integrity and eminence of Parliament in its accountability role vis-à-vis the Executive" (Independent Panel, 2008).
- 103 Response to request to Parliamentary Research Unit, June 2009.
- 104 This committee, which aims at consensus, determines the agenda of the National Assembly and includes chief whips from all parties and is attended by parliamentary staff.
- 105 Murray and Pillay, 2005, pp. 200-203.
- 106 Interview with parliamentary officer, Perran Hahndiek, National Assembly; Table: House Plenaries. An MP's motion can serve as an important way for an individual MP to bring a matter up for attention and may include a request for the Assembly to take a decision on or debate a particular matter. Parliament also attempts to include all political parties (through a subcommittee of the Chief Whips Forum) in the decision on whether to include a motion on the Assembly's agenda.
- 107 Murray and Pillay, 2005, p. 202.
- 108 Murray and Pillay, 2005, pp. 202-203. In emotive matters, the DA has allowed members to vote according to their conscience (for example, abortion-related legislation).
- 109 See National Chamber of Provinces voting patterns on the cross-border municipality legislation and the Constitutional Thirteenth Amendment Bill. See also Murray and Pillay, 2005, p. 202.
- 110 Murray and Pillay, 2005, p. 202.
- 111 Murray and Pillay, 2005, p. 201.
- 112 Nevertheless, party discipline is so strong that some parties made their members sign contracts to the effect that they would pay fines on defection. Note also that a ten percent threshold was required before party members were allowed to cross the floor.
- 113 Independent Panel Assessment of Parliament, 2008.
- 114 However, office-bearers who wish to attain seats in the National Assembly must satisfy the requirements of section 47 of the Constitution, 1996, which sets out membership criteria for the National Assembly and National Chamber of Provinces.
- 115 Murray and Pillay, 2005, p. 202.
- 116 Murray and Pillay, 2005, p. 202.
- 117 For example, the IFP constitution entitles all members to "freely take part in decisions and the work of the policy of the party", and the ANC constitution entitles all members to "[t]ake a full and active part in the discussion, formulation and implementation of the policy of the ANC", and to "[s]ubmit proposals or statements" to the appropriate structures.
- 118 W. Gumede, 2008, "Modernising the African National Congress: The legacy of President Thabo Mbeki", in Peter Kagwanja and Kwandiwe Kondlo (eds) *State of the Nation*, HSRC Press; R. Southall (ed), 2001, *Opposition and Democracy in South Africa*, Routledge.
- 119 For a full discussion of the evolution of the ANC's modernisation process, and the effect on internal party democracy, see Gumede, 2008, p. 36.
- 120 Various commentators have characterised the succession struggle between Thabo Mbeki and Jacob Zuma and the resultant factionalism among the ANC elite (culminating in Mbeki's ousting as President of South Africa in September 2008) as a contest between two opposing political cultures within the ANC: on the one hand a centralising political culture spearheaded by Thabo Mbeki, and on the other an open, participatory culture represented by Zuma. (Gumede, 2008.)
- 121 This had been a contentious issue ever since Mbeki changed the premier appointment procedure in 1999.
- 122 Disclosure must happen within a reasonable time period, as stipulated in the Public Funding of Represented Political Parties Act, 1997.
- 123 These include the UDM (Eastern Cape), IFP (KwaZulu-Natal) and Independent Democrats (Western and Northern Cape).
- 124 Examples are the ACDP (aimed at Christian voters), the Africa Muslim Party and, to an extent, the FF+ (aimed at the Afrikaner group).
- 125 One such party is the Pro-Death Penalty Party in Gauteng.
- 126 In the last election the party disputed this, pointing to significant inroads into black voting areas.
- 127 Collette Schulz-Herzenberg, 2009, "Trends in party support and voter behaviour, 1994-2009", in R Southall and J. Daniel (eds) *Zunami! The 2009 South African Elections*, Auckland Park: Jacana, p. 36.
- 128 South Africa shared this position with the USA, Spain, Taiwan, Cape Verde and Bosnia and Herzegovina. (Reporters Sans Frontières, 2008, "Only peace protects freedoms in post-9/11 world", available at <http://www.rsf.org/en-classement794-2008.html>.) Freedom House's Freedom of the Press 2008 survey placed it 59th out of 195 countries. (Freedom House, 2008, "Freedom of the Press 2008: Table of global press freedom rankings", available at http://www.freedomhouse.org/uploads/fop08/FOTP2008_WorldRankings.pdf.)
- 129 The Constitutional Court and High Courts have the jurisdiction to decide cases concerning freedom of speech, and have to weigh up competing interests in a particular set of circumstances.
- 130 These include the Broadcasting Act 4 of 1999, Broadcasting Amendment Act 4 of 2009, the Independent Communications Authority of

- South Africa Act 13 of 2000 and the Electronic Communications Act 36 of 2005.
- 131 The Imprint Act 43 of 1993 requires only that the name and address of the printer appear on any printed matter.
 - 132 Constitution, 1996, section 92; Independent Communications Authority of South Africa Act, 2000.
 - 133 In *National Media Ltd. & Others v Bogoshi* 1998 (4) SA 1196 (SCA), the Supreme Court of Appeal developed the common law to include an additional defence: that the publication of the statement, although false, was reasonable. The ruling was confirmed by the Constitutional Court in *Khumalo & Others vs Holomisa* 2002 (5) SA 401 (CC).
 - 134 In July 2009, the South Gauteng High Court ordered that the investigation by the JSC of Western Cape Judge President John Hlophe for alleged misconduct be opened to the public and the media.
 - 135 *Laugh It Off Promotions CC v SAB International* (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC).
 - 136 See *Jamiat-Ul-Ulama of Transvaal v Johncom Media* and interdicts sought in cases involving the SABC and the Ministry of Transport in 2006. Despite an increase in interdicts in 2007, the court judgment in *Midi Television v Director of Public Prosecutions* has limited the circumstances in which a court will grant pre-publication interdicts. See criticisms by the Media Institute of South Africa (MISA) at <http://www.misa.org.za>.
 - 137 Global Integrity Report 2008: South Africa: Integrity Indicators Scorecard. Available at: <http://report.globalintegrity.org/South%20Africa/2008/scorecard/7>
 - 138 See *Tshabala-Msimang v Makhanyane* 2006 ZAGPHC 161. The Minister sued the *Sunday Times* for the return of her medical records obtained without her consent, and also urged the court to interdict it from further commenting on her record. Jajhbay J refused to grant such interdict. In a victory for media freedom and democracy, the judge stated that the public had a right to be informed about public figures.
 - 139 Sibusiso Ngilwa, 2007, "Phahad may cancel adverts in *Sunday Times*", *Independent Online*, 7 September, available at http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20070907040544465C139120.
 - 140 The government claimed that it was aiming to shield minors from pornography, rather than to censor.
 - 141 The Protection of Information Bill, B28-2008, proposed a broad limitation on the publication of classified information if in the national interest. Newspaper groups claimed that this would limit their ability to report on important stories. The draft National Key Points and Strategic Installations Bill, 2007, which barred the publication of matters relating to strategic areas within South Africa without the Minister's consent first being obtained, was also put aside following public criticism.
 - 142 A. Quintal, 2008, "ANC has new plans to start own newspaper", *Independent Online*, 11 March, available at http://www.iol.co.za/index.php?set_id=1&click_id=3045&art_id=vn20080311054658793C915335.
 - 143 See ANC 52nd National Conference 2007 Resolutions (Polokwane Resolutions), 46. In Polokwane, the ANC presented the idea of the Media Appeals Tribunal as "an initiative to strengthen the human rights culture embodied in the principles of our constitution (Constitution Act of 1996) and an effort to guarantee the equal enjoyment of human rights by all citizens." See also ANC's policy document entitled *Communications and the Battle of Ideas*, available at <http://www.anc.org.za>.
 - 144 In her column in *ANC Today* (11-17 September 2009), ANC National Executive Committee member and Deputy Minister of Communications Dina Pule reaffirmed the debate on the operationalisation of the Polokwane idea on the establishment of the Media Appeals Tribunal (available at <http://www.anc.org.za/ancdocs/anctoday/2009/at36.htm#art2>).
 - 145 OMD South Africa, 2009, *South Africa and SADC Media Facts*, p. 24, available at <http://www.omb.co.za/samediafacts2009.pdf>.
 - 146 See Media Sustainability Index, Africa (Objective 3: Plurality of News Sources). Available at: [http://www.irex.org/programs/MSI/Africa/south africa.asp#3](http://www.irex.org/programs/MSI/Africa/south%20africa.asp#3)
 - 147 Media Development and Diversity Agency Act 14 of 2002.
 - 148 Herman Wasserman, Tanja Bosch, Brett Davidson and Sean Jacobs, 2006, *Equal in the Eyes of the Media: Research into Visibility and Access to the Media by Underserved Groups*, Media Development and Diversity Agency, 2 May, available at <http://www.mdda.org.za/Unserved-&-Communities.htm>.
 - 149 Of the 3 800 applications, 3 351 were granted. (ICASA, 2008, *2007/2008 Annual Report*, available at <http://www.icasa.org.za/Judgements/Publication/AnnualReports/tabid/165/ctl/ItemDetails/mid/577/ItemID/343/RTID/60/Default.aspx>.)
 - 150 Interview with Shepi Mati, manager of Idasa's Radio Unit, September 2009.
 - 151 OMD South Africa, 2009, p. 15.
 - 152 In 2007, for example, 33.96 million South Africans had mobile phone access. In 2008 that number significantly increased to 39.66 million. (OMD South Africa, 2007, 2008, *South Africa and SADC Media Facts*, available at <http://www.omb.co.za/samediafacts.asp>.)

- 153 OMD South Africa, 2009, p. 15.
- 154 OMD South Africa, 2009, p. 15; IREX, nd.
- 155 Naspers (through Media24), Caxton, Avusa and Independent Newspapers. There are approximately 459 newspaper titles in circulation in South Africa, 251 of which are owned by the "Fantastic Four".
- 156 Electronic Communications Act 36 of 2005.
- 157 According to the MDDA in 2009, despite government intervention and BEE, the print industry continues to be dominated by a few white-owned companies. (Z-Coms, 2009, *Trends of Ownership and Control of Media in South Africa, report prepared for MDDA*, available at <http://www.mdda.org.za/Trends%20of%20Ownership%20and%20Control%20of%20Media%20in%20South%20Africa%20-%20Ver%203.3%20Final%20-%202015%20June%202009.pdf>.) Others argue, however, that the racial composition of print media ownership has changed significantly in the last few years. See J. Duncan, "The media and the elections" in J. Southall and J. Daniel (eds) *Zunami! The 2009 South African Elections*, Auckland Park: Jacana, 3 January, p. 218. In addition, see Ferial Haffajee, 2008, "Presentation of research on the South Africa press and the MDA", Freedom of Expression Institute: "While the colour of newspaper owners in this country may have changed, it is still a highly monopolised industry. Six groups own seventeen daily titles and eleven weeklies. The only newspapers that fall outside their ambit are *The Daily Dispatch*, *The Evening Post*, *Langa*, *Mail and Guardian* and *The Natal Witness*. In essence, while the face of media ownership has changed significantly, the base of ownership has not increased significantly," available at <http://www.fxi.org.za/content/view/165/>.
- 158 OMD South Africa, 2009, p. 18. SABC1 broadcasts free-to-air programming in all official languages and, according to AMPS 2009, it had 22.1 million viewers. Independent broadcaster eTV had 17.8 million viewers in 2009 (last seven days viewership). There are also subscription TV channels, including M-Net, which has been running since 1986 and, in 1995, launched a digital satellite service, DSTV.
- 159 The SABC owns five of the six national stations (the only privately owned station being Radio Pulpit) and 12 regional stations (mostly African language stations). According to the MDDA, the SABC accounts for 42% of radio stations in South Africa.
- 160 OMD South Africa, 2009, p. 21.
- 161 See section 10 of the Broadcasting Act, 1999, for the full mandate of the SABC.
- 162 In 2006, SABC took the *Mail & Guardian* to court to compel it to remove the report from its website and lost. Judge Zukisa Tshiqi found that it was in the public interest to release the report. See Chantelle Benjamin, 2006, "South Africa: Judge rules against SABC gag attempt", *Business Day*, 16 October, available at <http://www.afrika.no/Detailed/12914.html>. See also Idasa's report for UNECA (unpublished), 2007.
- 163 ICASA's Complaints and Compliance Committee held that it did not have jurisdiction over internal journalistic matters such as the SABC blacklisting. See Melissa Moore, 2009, "FXI deeply disappointed by ICASA's stance on blacklisting complaint", Freedom of Expression Institute, available at <http://www.fxi.org.za/content/view/210/>.
- 164 See also Idasa's report for UNECA, 2007.
- 165 Independent Communications Authority of South Africa Amendment Act 3 of 2006.
- 166 See also Independent Panel Assessment of Parliament of the Republic of South Africa, 2008.
- 167 Cosatu had argued that the sale unfairly transferred South African assets to a foreign company.
- 168 In April 2009, ICASA stated its intent to defend the sale and not to ask Vodacom to require ICASA's approval in respect of the transaction. Although the authority initially said that the merger could go ahead without its approval, just a month later ICASA had a last-minute change of heart and rescinded the decision following pressure from the Communication Workers Union and Cosatu. (C. van der Merwe, 2009, "ICASA won't oppose Vodacom ruling, independence questioned," *Engineering News*, 18 May, available at <http://www.engineeringnews.co.za/article/icasa-wont-oppose-vodacom-ruling-independence-questioned-2009-05-18>.)
- 169 Presentation to the portfolio committee of communication on ICASA strategic plan and budget, 18th June 2009. See <http://www.pmg.org.za/report/20090618-icasa-strategic-mandate-icasa-court-case-vodacomtelkom-deal>.
- 170 Sections 12 to 17 of the Broadcasting Act, 1999, deal with appointments to the SABC Board.
- 171 M. Alexander, nd, "South Africa's radio stations", available at <http://www.southafrica.info/about/media/radio.htm>.
- 172 In fact, apart from South Africa's 11 official languages, German, Hindi, Portuguese and the San languages of !Xu and Khwe all get airtime, with stations in three broad categories of broadcasting: public service, commercial, and community. (M. Alexander, nd.)
- 173 Z-Coms, 2009.
- 174 Fewer than one in five adults reads a daily newspaper, and fewer than one in three reads a weekly newspaper. (Haffajee, 2008.)
- 175 MediaClubSouthAfrica.com, nd, "The media in South Africa," available at http://www.mediaclubsouthafrica.com/index.php?option=com_content&view=article&id=110:the-media-in-south-africa&catid=36:media_bg.
- 176 For further discussion, see IREX, nd.

HUMAN DIGNITY AND DEMOCRACY

BY JUSTIN SYLVESTER AND NONHLANHLA CHANZA¹

Our understanding of democracy is twofold: firstly, do the people rule, and secondly, do the people rule equally? In the post-1994 era, the people rule via an institutionalised procedural democratic framework. Whereas the pre-1994 regime completely disregarded individuals' human, political and socio-economic rights, the current democratic regime has sufficiently realised the human and political rights of all South Africans. But citizens cannot be said to rule equally until they enjoy, equally, the socio-economic rights afforded to them by the Constitution.

Firstly, we assume that access to basic goods and services and to economic opportunities is a necessary condition for a dignified life. Secondly, the South African Constitution makes government responsible, in the final instance, for ensuring such access to all citizens. Human dignity, therefore encapsulates the broad set of socio-economic rights of individuals that would enable them to lead dignified lives.

We also understand human dignity and democracy as having a mutually reinforcing relationship. Unless democracy delivers more than just an institutionalised procedural framework for the management of competing interests, it risks losing legitimacy and popular appeal among citizens. This is acutely so in the South African context, where the majority of citizens face a wide range of socio-economic challenges. We also understand that the realisation of socio-economic rights for all is not only a constitutional imperative, but is widely supported among the citizenry as being the cornerstone of a post-1994 democracy. This prioritisation of dignity is consistent with the importance it is accorded in international proclamations such as the United Nations Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

Therefore an evaluation of the degree of access to those services and opportunities that dignity requires is a key part of evaluating the state of democracy. This is the case not only because the concept of democracy appears incompatible with a situation in which many people cannot live dignified lives, but also because a democracy that does not protect and extend the opportunity for dignity may not be a sustainable democracy at all. Thus, no book that seeks to assess the state and progress of South

Africa's democracy can ignore the disjuncture between the institutional framework that promotes human dignity and the substantive delivery of it.

Socio-economic rights' protection

83. *How far are economic and social rights, including equal access to work, guaranteed for all?* (6)
84. *How effectively are the basic necessities of life guaranteed, including clean, adequate and reasonably accessible water, adequate food, adequate housing and shelter, and adequate and unimpeded access to land?* (4)

As is well known, South Africa has among the highest levels of poverty, unemployment and inequality in the world. Many of these problems stem from decades of skewed policy, planning and resource allocation that disadvantaged the majority of South Africans for the benefit of a few. Since 1994, some gains have been made, yet the problem remains systemic and acute.

South Africa's Constitution is unique, given that it enshrines socio-economic rights in Chapter 2 (the Bill of Rights). It is unique because this means that socio-economic rights are justiciable and citizens are therefore able to sue for access to such rights. Indeed, South Africa has seen many instances where the Constitutional Court has had to interpret precisely what the parameters of these rights are. The Constitution also recognises, however, that not all socio-economic rights will be immediately fulfilled, and so the state is generally required to take reasonable measures, within available resources, to ensure that these rights are progressively realised. The Constitution therefore places a responsibility on those who have been elected to apply their minds carefully to the way in which rights can be progressively realised. As will be seen later in this chapter, the gap between the constitutional aspiration of the fulfilment of socio-economic rights and the current reality of poverty and high levels of inequality has created a situation in which many citizens feel marginalised and excluded from society. Exclusion and inequality in all spheres have come to mark South African society, often giving rise to violent protests and, as was seen in 2008 and 2009, xenophobic attacks.

The Constitution and pursuant legislation establish a solid foundation in which the state is required to work to "[i]mprove the quality of life for all citizens and free the potential of each person."² The Bill of Rights requires that economic and social rights be promoted and protected through legislation. These rights include the right of adequate access to housing; the right of access to health care services; the right to sufficient food, water and social security; and the right to basic education and adequate access to further education.³

However, the state's obligations with respect to the fulfilment of socio-economic rights are qualified rather than absolute: the state is required to achieve the progressive realisation of these rights subject to available resources. These constitutional

obligations have been affirmed and expounded in several landmark Constitutional Court judgments.⁴ Although South Africa's socio-economic rights framework is silent on the issue of employment,⁵ few governments have formalised the right to work (India being a notable exception).⁶

The Constitutional Court has emphasised, however, that the state has an obligation to alleviate the indigent conditions of South Africa's poor, including measures to ensure adequate access to water, food, housing and land. As noted, the court has reiterated the constitutional recognition that this obligation should be progressively realised subject to the availability of resources⁷ and has, in a number of rulings, invoked the criterion of "reasonable measures" in assessing whether the state has fulfilled its obligations.

Access to water

Access to water is a key dimension of human dignity since water is necessary both for survival and for general health. Adequate access to water should be understood as access to a reliable source of clean drinking water that is on-site.⁸ The lack of water access, thus understood, remains a challenge with regard to the improvement of the lives of ordinary South Africans. Water sector debates have been marked at times by strong disagreements between those favouring economic tariff usage in order to recover costs and those arguing for a greater degree of "free" provision to poor households.

South Africa has made considerable strides in broadening water access, especially considering the markedly inadequate and inequitable distribution of water access prior to democracy. In the period between 2002 and 2009, for example, the number of households without access to water infrastructure declined markedly from 10% to 3.5%. Households benefiting from the free basic water policy also increased from about 7 million to 11 million over the same period.⁹

Table 5.1 indicates that more than 80% of South African households are currently enjoying access to basic water and that between 2001 and 2007 the percentage of households with access to an on-site tap increased from 61% to 70%. Access to adequate water has varied by income, however, with highly urbanised and better-resourced provinces such as Gauteng and the Western Cape exhibiting significantly less backlogs in water infrastructure than provinces such as Limpopo and the Eastern Cape.¹⁰

Table 5.1: *Households with access to potable water (millions, rounded)*¹¹

	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Total number of households (HH)	11.9	12.1	12.4	12.7	12.8	12.9	13.1
HH with access to decent water infrastructure	9.4	9.3	9.9	10.5	10.8	11.2	13

	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
% of total	78.2%	76.3%	79.8%	82.7%	84.7%	87.2%	91.8%
HH with access to poor water infrastructure	1.4	1.7	1.5	1.3	1.2	1	0.604
% of total	11.8%	14.4%	12.1%	10.6%	9.3%	7.8%	4.6%
HH with no access to water infrastructure	1.2	1.1	1	0.84	0.77	0.65	0.46
% of total	10%	9.3%	8.1%	6.7%	6%	5%	3.5%
HH with access to free basic water	7	7.2	8.9	8.9	9.5	11.9	11.2
% of total	59.18%	59.7%	71.5%	70.43%	74.54%	84.2%	85.5%

Access to food

Access to adequate food is a condition for survival and an essential socio-economic right. Between 2002 and 2006, the percentage of households in which an adult suffered from hunger decreased from 6.9% to 2.5%. The percentage of households where one child suffered from hunger decreased from 6.7% to 2.4% during the same period.¹² This is a significant improvement in meeting the challenge of hunger among the poor. However, despite improvement having been made in the alleviation of malnutrition among children over a similar period, a large number of children remain malnourished. The government's Integrated Nutrition Programme consistently feeds approximately 4 million children per annum.¹³ This has had a significant impact, as Table 5.2 indicates that malnutrition among children under the age of five decreased from 88 971 in 2001 to 29 165 in 2007, but the challenge remains daunting with regard to moderate malnutrition.

Table 5.2: *Severe malnutrition among children under five*¹⁴

	2001	2002	2003	2004	2005	2006	2007	2008
Number of children	88 971	83 957	64 718	39 785	30 082	29 176	29 165	26 373

Access to housing

Significant progress was made in the early years of democracy with housing provided through the government's Reconstruction and Development Programme (RDP). The Presidency's *Towards a Fifteen Year Review* indicates that between 1994 and 2008, the construction of 2 358 667 housing units helped approximately 9.9 million South Africans. Female-headed households received almost 53% of this housing.¹⁵ However, despite significant progress, many poor households do not have access to adequate housing and there are some concerns about the quality of government

housing. Furthermore, co-ordination between housing provision and the provision of household services such as sanitation, access to water and refuse collection has not always been effective.

The government highlights the slow pace in releasing state-owned land for housing development as a key challenge in meeting the ever increasing demand for housing, particularly in the country's urban areas. A large proportion of new housing projects are located far from economic centres, thus contributing to urban sprawl and placing further strain on South Africa's transport infrastructure.¹⁶ Moreover, these realities put further pressure on the poor by increasing the cost of commuting work and decreasing the time available to the poor for active citizen engagement in activities such as community police forums, school governing bodies and other community work, and thus also negatively affecting levels of social cohesion and capital. Although the number of black homeowners exceeded their white counterparts for the first time in 2008, residential areas remain largely segregated by race and class. Coupled with the lack of spatial concentration of housing in urban areas, this is inimical to social cohesion.

Adequate and unimpeded access to land

Landownership has been a key source of oppression and political tension since the passing of the Native Land Act 27 of 1913, which essentially dispossessed black South Africans of access to land and placed 80% of it in the hands of white South Africans who accounted for no more than 20% of the population at the time. Land redistribution and restitution remain key dimensions of transformative justice in South Africa.

While the redistribution of land into the hands of South Africa's black majority has been slow since 1994, more progress has been made in the area of land *restitution*. By 2008, the government had settled 74 747 land claims, benefiting approximately 1.4 million people. Since about 2005 the rate of claim settlements has slowed significantly due to the complex nature of the remaining claims, many of which are based in rural areas.¹⁷

However, progress in land redistribution has been poor. Though the government set a target of redistributing 30% of white-owned land by 2015, only 4.8 million hectares of the targeted 24.9 million hectares had been transferred by 2008.¹⁸

Thus, in order for the state to meet its obligation to provide access to adequate land, the government's land reform programme will have to be sped up significantly, despite significant progress having been made up to 2008.

Table 5.4: *Land restitution*¹⁹

	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Total settled claims	29 877	36 488	48 825	59 345	71 646	74 417	74 747	75 400

Table 5.5: Land redistribution (millions, rounded) ²⁰

	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Hectares per year	344 435	279 838	176 871	214 998	197 891	241 526	345 442	443 600
Total	0.98	1.3	1.4	1.7	1.8	2.1	2.4	2.9

Health care

85. *To what extent is the right to adequate health care protected in all spheres and stages of life? Is treatment available for illnesses such as HIV/AIDS? Is access to this treatment equitable?* (4)

The right to health care is protected in the Constitution's Bill of Rights.²¹ The Constitutional Court has also affirmed this socio-economic right in *Treatment Action Campaign v Minister of Health*, where the court ruled that the government had failed in its obligation to provide health care services (in this case a comprehensive programme to prevent mother-to-child HIV transmission).²² This constitutional imperative has also been bolstered by the passing of the National Health Act 61 of 2005, which seeks to establish a better-co-ordinated framework and a more equitable health system.

However, South African health outcomes remain poor and progress in realising access to health for all South Africans is currently hampered by at least three significant challenges. The first is the severe inequality between private and public health care in terms of both service quality and per capita expenditure. The second is a bureaucratic, managerial and clinical crisis in the public health system itself, and the third is the crisis of HIV/AIDS.²³

Life expectancy and infant mortality rates are two indicators for population health more generally. As Table 5.6 shows, South Africa is characterised by low levels of life expectancy, largely reflecting assumptions on current HIV/AIDS prevalence rates and future incidence rates. More positively, the infant mortality rate²⁴ decreased from about 61 deaths per 1 000 births in 2002 to about 46 deaths in 2009.²⁵

Table 5.6: Life expectancy and infant mortality²⁶

	Male LE at birth	Female LE at birth	Infant mortality rate
2002	51.4	56.3	61.3
2003	50.8	55.3	59
2004	50.3	54.6	56.2
2005	50.7	54.7	52.6
2006	51.4	55.5	49.8
2007	52.2	56.1	48.1
2008	53.3	57.2	46.4
2009	53.5	57.2	45.7

Access to health care continues to be enjoyed unequally among South Africans. Private health care remains the preferred choice of higher income earners, while the overwhelming majority of poor South Africans receive their health care from an overburdened public health system.²⁷ According to the 2008 General Household Survey, only 7.4% of black South Africans are covered by medical aid, while 66.5% of whites have health insurance.²⁸ The public system spends about the same total amount as the private system annually, which means significantly less per capita (R1 300) in comparison with the private health care system (R9 500).²⁹ Systemic and institutional problems such as shortages of skilled staff, management failures and overburdening appear to have compounded the financing challenges facing the public system, and suggest that simply increasing resources to public facilities will not necessarily improve health outcomes or citizens' satisfaction levels.³⁰

The crisis of HIV/AIDS has exposed and amplified the frailties and weaknesses of health care in South Africa and placed tremendous additional pressure on the public health care system. HIV prevalence rates have steadily increased between 2001 and 2009. Approximately 71% of deaths between the ages of 15 and 49 are reportedly caused by HIV/AIDS.³¹

Largely as a result of citizen campaigning, South Africa currently boasts the largest antiretroviral therapy (ART) programme in the world.³² Between 2005 and 2009, the state increased its rollout of ART from 133 000 persons to 800 000. This shows significant progress in the realisation of citizens' right to health care access and is commendable. However, this programme remains inadequate given the burden of HIV/AIDS faced by South Africa. It is estimated by the Treatment Action Campaign that over 5 million South Africans are infected with HIV. Tables 5.8 and 5.9 show the contrast between the numbers of persons requiring ART and those on treatment.

Table 5.8: *Number of persons in need of ART*³³

Year	Adults (15 + years)	Children
2005	1 156 000	73 000
2006	1 242 000	75 000
2007	1 329 000	82 000
2008	1 420 000	91 000
2009	1 524 000	106 000

Table 5.9: *Provision of ART*³⁴

Year	Number of adults (15+ years) receiving ART	Number of children receiving ART	Estimated percentage of children receiving cotrimoxazole
2005	133 000	7 000	16.6
2006	255 000	19 000	24.4
2007	430 000	32 000	32.2
2008	655 000	55 000	40
2009	800 000	70 000	42.5

Despite constitutional recognition of the right to health, this right is unequally and insufficiently realised in South Africa. Low levels of life expectancy, increasing inequalities between public and private health sectors and the crisis in the public health system undermine a progressive legislative framework. Moreover, the Mbeki administration's lethargic response to HIV/AIDS cast a shadow over the health of South Africans, the impact of which is still difficult to assess.

Education

- 86.** *How extensive and inclusive is the right to education and training, including education in the rights and responsibilities of citizenship?* (5)

The Constitution protects the right of each citizen to basic education, as well as adult basic education (to bridge the inequities of the previous education system). South Africa is also a signatory to the UN Rights of the Child, which requires education as a secured right for every child.³⁵ The legal and regulatory framework includes the South African Schools Act 84 of 1996 and the Further Education and Training Act 98 of 1998.

Legislation requires compulsory education for children aged between 7 and 15.³⁶ Furthermore, the Constitution places no limitation on rights regarding minors. Therefore, education for children is a basic right imposing an absolute obligation on the state. However, the inequities in the education system, inherited from the Bantu education system of the apartheid era that was designed to under-educate the majority of South Africans, remain largely in place. The legacy left by apartheid-era education posed a monumental challenge to South African society and in many ways continues to do so. Despite higher levels of expenditure on education, improved access and wide-ranging restructuring and policy changes, far too many South African children continue to have a poor educational experience and perform poorly in standardised international assessments.

According to the 2007 General Household Survey, between 2002 and 2007 the enrolment rate for 5-year-olds increased from 40% to 60%, the enrolment for 6-year-olds increased from 70% to 88% and the enrolment for 7- to 15-year-olds increased from 96% to 98%.³⁷ The learner-educator ratio was also decreased from 32:1 in 2005 to 31:1 in 2007, which is an improvement.³⁸ However, the matric pass rate decreased from 68.3% in 2005 to 65.2% in 2007. Further, although enrolment levels for tertiary education increased from 300 000 in 1986 to 750 000 in 2005, distribution remains skewed in favour of whites, who accounted for 60% of higher education participants. Levels of adult literacy have improved steadily since 2002, with an increase from 70.7% to 74.4% in 2006.³⁹ But adult literacy rates still remain far too low and continue to impair the human dignity of many of South Africa's poor.

Allocations to education make up approximately 25% of the Budget and remain the largest single functional area of resource allocation. However, despite significant real increases in education expenditure since about 2001, provincial expenditure on

education has recently declined in a number of provinces.⁴⁰ Some provinces are also beset by management challenges in their education sectors. It has been suggested that South Africa's public schools and even some centres of higher education have been crippled by institutional failure due to poor management, low teacher morale, decaying infrastructure and a number of changes to the curriculum without proper support.⁴¹

Without doubt it is the *quality* of education that now needs the greatest attention in South Africa. Although increased participation is, of course, welcomed, South Africa has performed poorly in a number of comparative studies on education with less-resourced neighbouring countries, particularly with regard to numeracy and literacy, as well as maths and science ability.⁴²

This indicates that South Africans are not getting enough value for money in education, although a greater number are participating in the system. Despite the increase in expenditure, the sweeping legislative and policy changes, and the significant restructuring in the education sector, education outcomes remain poor and unequal.

Poverty

- 87. *Are vulnerable groups such as children, the disabled and women adequately protected from poverty?* (6)
- 88. *How much impact on political participation does poverty have? How far are poor people able to participate in the wider South African society? To what extent are they excluded?* (4)
- 89. *To what extent is the state "progressively realising" these social and economic rights in accordance with its Constitutional obligations?* (5)

The South African state is required to initiate poverty alleviation programmes in accordance with its constitutional and international obligations, particularly with regard to women and vulnerable groups such as children and the disabled.⁴³ However, this is to be achieved within the constraints imposed by state resources.

Poverty in South Africa is both deep and wide and racialised. It is now well established that poverty "deprives [the poor] of meaningful participation in the essential political, economic, social and cultural activities of their society."⁴⁴ The Human Sciences Research Council (HSRC) found in a commissioned study for the Independent Electoral Commission (IEC) that voter registration levels were lowest among those respondents who indicated that they received no income.⁴⁵ South Africans who live in poverty are thus excluded not only from the economic benefits of democracy, but also from its social and political benefits, and hence from upholding their dignity.

However, the state has made great strides in easing the severity of this poverty, primarily through its social grants, and significant net jobs were created by the South African economy before the onset of the global contraction. Analysis of the All Media and Products Survey (AMPS) indicates that "in terms of headcount, depth and severity

[poverty] seems to have increased slightly from 1993 to 2001, but decreased substantially from 2001 to 2006", which the authors suggest can be significantly attributed to the "dramatic expansion in social grants expenditure from 2002 onwards".⁴⁶ Table 5.10 shows poverty trends for the simple headcount rate of poverty.⁴⁷

Table 5.10: Income poverty trends (R322/month poverty line – 2000 rands)⁴⁸

	Headcount rate	
	1995	2005
Black	63,04%	56,34%
Coloured	39,00%	34,19%
Asian	4,71%	8,43%
White	0,53%	0,38%
Total	52,54%	47,99%

However, poverty remains vastly skewed according to race, with black South Africans (who constitute 79% of the total population) accounting for 93% of those living on less than R322 a month in 2005.⁴⁹ There is also a great gender disparity to poverty: poverty disproportionately affects women. Female-headed households have seen a decrease in poverty levels, but poverty continues to be disproportionately female. Although only 43% of South Africans lived in female-headed households in 2005, more than half of those living under the R322 a month poverty line lived in female-headed households.⁵⁰

The reach of the government's social grant system increased from 2.5 million recipients in 1999 to over 12 million recipients in 2007, with the child support grant accounting for the bulk of these grants. Moreover, much progress has been made in the protection of socio-economic rights of vulnerable groups. The state's Expanded Public Works Programme, which the government claimed created almost a million temporary work opportunities between 2004 and 2007, has also been a driver in the alleviation of poverty, with women accounting for 48% of these work opportunities.⁵¹

The gradual decrease in levels of poverty and unemployment (at least before the impact of the recession from the end of 2008), combined with the increased protection of vulnerable groups such as children and the disabled, is indicative of the government's improved efforts towards the progressive realisation of socio-economic rights by all South Africans. It also reflects, however, the more favourable economic circumstances of the period from 2001 to 2007, which enabled the South African economy to grow quite rapidly and create jobs, and also provided the government with appreciably more tax revenue to spend on the alleviation of poverty.

Jobs and rights in the workplace

90. Is there equal opportunity for all, irrespective of race, in the labour market and in the workplace

(5)

The legal framework governing labour in South Africa is set up to achieve redress regarding representation in the workplace and includes the Employment Equity Act 55 of 1998, the National Youth Commission Act 19 of 1996, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Thus, according to the legal framework, there is equal opportunity for all. But this is not the case in practice. There has been an increase in demographic representivity in the public service. The percentage of black South Africans in top manager positions increased from 21.1% in 2004 to 22.2% in 2006, while the percentage in senior manager positions increased from 25.7% to 26.9%.⁵² However, in the context of demographics, much ground remains to be covered in this regard. Although there has been a steady increase in representivity there has not been sufficient progress.

There has also been insufficient progress in terms of gender representation in the workplace. The percentage of female top managers increased from 15.1% in 2004 to 21.6% in 2006. In the same period the percentage of female senior managers increased from 23.7% to 27.4%.⁵³

As regards opportunity in the labour market, unemployment remains skewed to the detriment of black South Africans, women and youth, who continue to constitute a disproportionately large share of the unemployed. With regard to gender, for example, black women have an unemployment rate that is ten times higher than white women, and have an unemployment rate of 37% in relation to black men, who have a 25% unemployment rate.⁵⁴ According to the 2007 Labour Force Survey, youth comprise almost 70% of South Africa's unemployed.⁵⁵

Table 5.13: *Unemployment rates March 2001 to March 2009 (percentage)*⁵⁶

	2001	2002	2003	2004	2005	2006	2007	2008	2009*
Male	24.6	26.1	27.2	23.9	22.4	21.6	21.1	19.9	21.8
Female	28.6	33.9	35.9	32.9	31.4	30.3	30.8	26.8	25.7
Total	26.4	29.7	31.2	27.9	26.5	25.6	25.5	23.2	23.6

* 2009 column refers to the Quarterly Labour Force Survey rates for the second quarter of 2009. All other columns are annualised rates.

Table 5.14: *Unemployment rates including discouraged workers: March 2001 to March 2009 (percentage)*⁵⁷

	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total	36.1	40.4	42.5	40.8	39.5	37.9	37.1	31.5	32.5

However, the impact of the recent economic recession in 2009 has not been reflected by a spike in the official or narrowly defined unemployment rate because the significant job losses have been accompanied by a significant decrease in the size of the labour force – that is, in fact by increases in the numbers of discouraged work-seekers as reflected in Table 5.14. In the second quarter of 2009 some 267 000 jobs were lost, or almost 2% of jobs, but the labour force contracted by a significant 325 000, or about 2%, so the official unemployment rate has not changed much.

The large majority of those who are no longer part of the labour force become the “discouraged work-seekers”. A year ago, in the second quarter of 2008, South Africa had 1.08 million discouraged work-seekers; in the first quarter of 2009 there were 1.22 million. At the end of the second quarter of this year the total was 1.517 million, or 302 000 more than in the first quarter.⁵⁸ However, the broadly defined rate was recently adjusted from 32.5% (March 2009) to 34.1% (September 2009), indicating that the impact of the recession on job losses has deepened even further, with 484 000 people leaving the official labour force to join other discouraged workers.⁵⁹

91. *How far are workers’ rights to fair rates of pay, just and safe working conditions and effective representation guaranteed in law and practice?* (7)

Here the legal framework includes the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997. Legislatively, then, labour rights are well-protected.

Employment equity legislation applies to all employers and workers and protects workers and job-seekers from unfair discrimination, and it also provides a framework for implementing affirmative action. Moreover, the presence of a highly organised, active and powerful trade union federation, the Congress of South African Trade Unions (Cosatu), does much to enhance this sweeping labour legislation. However, the rights protection of workers and the concomitant support of the labour movement do not extend to the informal labour force, which includes domestic workers. Given the size of the informal sector in South Africa this remains a significant challenge.⁶⁰

92. *How far are wage levels and social security or other welfare benefits sufficient for people’s needs, without discrimination (equally)?* (6)

The decline in poverty in South Africa, at least prior to the recession, can be attributed to economic growth and job creation as well as the state’s provision of social security via the social grants system. It is difficult to assess the extent to which newly created jobs provide a living wage, or how many South Africans should be classified as ‘working poor’.

Unions play a key role in determining wage levels in bargaining councils. According to the National Labour and Economic Development Institute (Naledi), the apparent trend of business and labour consistently negotiating wage increases that exceed the anticipated inflation rate is in fact misleading.⁶¹ Low wage earners are disproportionately affected by inflation compared to higher wage earners due to the larger proportion of their wages being spent on food, transport, health care and education. Average wage increases do not offset the increases in basic necessities.⁶² Thus, wage increases do not keep workers above the poverty line, leading to “working poverty”. Naledi also found that the average increases of wages for executives often were 54 times higher than those of workers, indicating the gross disparity between

wage levels.⁶³ South Africa continues to exhibit a large wage gap between ordinary workers and executives.

However, given high unemployment rates, the absence of comprehensive social security and, in all probability, a reduced fiscal envelope over the medium term, the primary challenge over the next few years is likely to be less the wage level of those who work and more ensuring some form of income or access to basic services for all South Africans.

Delivery of social and economic rights

93. *Are public goods, for example water provision or local services such as waste collection, equally available to citizens and communities at similar levels of efficiency and competence?* (5)

Since 1994, the government has consistently prioritised the delivery of basic services to all in its policies and programmes. Despite commendable quantitative progress and impressive statistics in service extension,⁶⁴ questions have been raised around the quality, affordability and adequacy of services and the efficiency with which they are delivered. Further concerns relate to the perceived unequal distribution of services among communities. There is a growing concern that urban areas, larger towns and suburbs receive better or higher levels of service than semi-urban areas, rural communities and informal settlements.

Regarding waste collection, the Community Survey of 2007 revealed that the percentage of households whose refuse was removed by the local authority at least once a week had increased from 55% in 2001 to 60% in 2007. Though the survey shows some improvement, this is not a substantial increase and delivery is still fraught with problems of disparity and inefficiency. The General Household Survey of 2007 also revealed marked disparities concerning access to refuse removal services among provinces.⁶⁵ Furthermore, an assessment study on the Status of Waste Service Delivery and Capacity at Local Government Level revealed severe backlogs in the adequate and efficient delivery of municipal waste collection services.⁶⁶ Oelofse further maintains that residents in peri-urban and rural areas had limited access to formal waste collection services compared to their counterparts in urban areas.⁶⁷

Table 5.15: *Access to basic services*⁶⁸

Households	1993-94	1998-99	2003-04	2007-08	2008-09
Water infrastructure					
Equivalent to or above RDP standard (200 m to communal tap)	62%	69%	80%	90%	92%
Electricity	51%	61%	72%	73%	
Sanitation	50%	56%	66%	75%	77%

Table 5.15 shows the progress made in the delivery of services such as water, electricity and sanitation to South African households from 1994 to 2009. Remarkable progress has been made in the percentage of households with access to at least rudimentary water infrastructure, which increased from 62% in 1994 to 92% in 2009.

Substantive access to water services has, however, been undermined by factors such as undue interruptions in the water supply,⁶⁹ the poor quality of water available to households, the cutting off of services to households that cannot afford them and connection fees that are at times unaffordable to poor households.⁷⁰

Considerable progress is also notable in the electrification of South African households. As shown in Table 5.15, the number of households with access to electricity increased from 51% in 1994 to 73% in 2008. However, there were still about 3.4 million households with no access to electricity at the end of that period.⁷¹

Over the years serious concerns have been raised around electricity piracy and illegal connections, which are most prevalent in poor communities and in informal settlements some of which are said to be “not in serviceable sites”. Access to electricity is also linked to access to proper housing, since households in areas considered “illegal” are by implication excluded from free basic electricity provision. The Development Indicators for 2009 also note that the “rate of new electricity connections is slowing down considerably as it now has to be preceded by the establishment of bulk infrastructure in areas that were not previously served”.⁷²

Generally, the statistics show that much progress has been made towards providing South Africans with access to basic services. However, bigger challenges around service affordability and citizen satisfaction remain, and services still have to be equally and efficiently provided to all people irrespective of their financial background and where they reside. In recent years, aggrieved communities have engaged in numerous service delivery protests to highlight their plight. The government has released a detailed report citing poor communication and accountability relationships with communities, corruption and fraud, poor financial management, weak civil society formations, factionalism within and between political parties, and poor capacity due to scarce skills as some of the reasons for the outbreaks of violent service delivery protests.⁷³

94. *To what extent has privatisation had an impact on the adequate provision of public goods and services?* (5)
95. *To what extent do public-private partnerships or does privatisation facilitate or impede access to socioeconomic rights, particularly for the poor?* (5)

South Africa's decision to involve the private sector in the provision of basic services in the mid 1990s is directly related to a shift in the ruling party's macro-economic policy which led to the adoption of the Growth, Employment, and Redistribution (GEAR) programme in 1996. As a result, the private sector became increasingly involved in the provision of public services, especially water. This involvement has

over the years been actively resisted, leading to the formation of various anti-privatisation movements such as the Anti-Privatisation Forum, which is a member of the Coalition Against Water Privatisation.⁷⁴

This resistance is today credited for slowing down the government's water privatisation efforts: by 2005 only five leases with private companies were active, three of which had been signed before 1995.⁷⁵ As of 15 January 2009, 19 public-private partnership (PPP) projects had been signed in terms of Treasury Regulation 16, 40 were either in preparation or registered in terms of Treasury Regulation 16, and there were not more than 20 registered municipal PPP projects.⁷⁶ Nevertheless, the increased use and continuous installation of prepayment water and electricity meters, regarded as the ultimate cost recovery mechanisms associated with the private sector and now also used by the public sector, have raised debates and concerns around their impact on service delivery. In a recent Constitutional Court ruling on the use of prepayment water meters by the City of Johannesburg in a poorer part of Soweto, the court ruled largely in favour of the city's policies and did not regard the use of such meters as inherently unconstitutional.

Communities with metered service supplies have raised concerns in various research studies⁷⁷ around the high bills that can follow installation. International experience also shows that private sector involvement in the provision of services usually results in an escalation of prices, which places a burden on low income families.⁷⁸ As a result, basic services for poor households with metered supply have become unaffordable commodities. To broaden access to services, a free basic water and electricity policy⁷⁹ was introduced in 2001 aimed at providing households with 6 000 litres of free water and 50 kilowatt-hours of free electricity per household per month. However, there appear to have been flaws in the execution of the policy, with some households claiming lack of information on how this policy works and how it can be accessed.⁸⁰

Harsh cost recovery mechanisms that result in high tariffs and pervasive service cut-offs should be avoided. The government needs to mitigate the negative effects of the use of private companies in the provision of basic services and further reflect on the cost recovery mechanisms and profit motives of the private sector, which at all times must be balanced against the needs of the public.

- 96.** *To what extent are private companies accountable for the delivery of socio-economic rights as a result of privatisation or PPPs? To what extent is this accountability overseen by citizens or their representatives?* (4)

Section 217 (1) of the Constitution, 1996, lays down the foundation for procurement in the country and envisages a system which is transparent and ensures accountability.⁸¹ South Africa also has a legal framework aimed at ensuring delivery and accountability from PPPs. At national and provincial level, South African PPPs are regulated by the Public Finance Management Act and Regulation 16 of the Treasury Regulations. Municipal PPPs are regulated by the Local Government: Municipal Finance Management Act 56 of 2003, municipal PPP regulations and the Local Government:

Municipal Systems Act 32 of 2000. These regulations are commended for assigning strong levels of accountability and are praised for being based on strong contractual agreements⁸² that help monitor the spending of public money.⁸³

Despite the existence of a strong regulatory framework, questions have been raised around the ability of government to oversee private sector performance and delivery, perform regular performance assessments and ensure general enforcement and monitoring of service provider contracts.⁸⁴ Of crucial concern is the ability of the government to draft strong, enforceable contractual agreements that also enable it to have a say in price increases and give it space for renegotiating. Other questions relate to the government's ability to ensure that the private sector meets performance targets defined in the contractual agreements.⁸⁵ Generally, noncompliance with agreements remains the biggest challenge to PPP delivery. Participants in the Regional Dialogue on Partnership Governance and Accountability⁸⁶ maintained that government departments lacked the institutional capacity to enforce contractual agreements, execute PPPs and ensure compliance with accountability measures contained in the legislative framework.⁸⁷ They recommended that the Department of Public Service and Administration develop a pool of people who would prepare and monitor contracts. Addressing the same concern, Water Dialogues-South Africa⁸⁸ recommended the use of independent monitors to "assess both contractor and contracted party obligations and user experiences."⁸⁹

Of further concern is the lack of direct accountability to users, government failure to provide effective oversight and lack of public participation when authorities make decisions around service delivery options and providers. Poor communication systems and non-functional structures for public participation in local government are to blame for a breakdown in communication. However, citizens can still use the Promotion of Access to Information Act, 2000, to hold companies accountable. This Act allows citizen access to records held by both public and private bodies, and the information obtained can be used to scrutinise the delivery record of the companies involved.

The government remains accountable for the delivery of services, and where it uses private sector service providers, it has to ensure that they deliver and meet performance targets as stipulated in the contractual agreements. South Africa appears to have a strong regulatory framework, but challenges around the enforcement of contracts are too numerous to be ignored. The government needs to capacitate its departments and improve its ability to enforce contracts and, where possible, introduce harsh sanctions for non-compliance. The government should further define a role for civil society and other affected communities when PPPs are decided upon. South Africa gets an index score of 4.

97. *To what extent do citizens feel they are receiving equal access to public resources regardless of their social grouping?* (6)

Table 5.16: *Public perceptions of government performance*⁹⁰

Average % for preceding five years	1999	2004	2008
Addressing the problem of HIV and AIDS	61	60	63
Building houses	49	59	63
Bringing police closer to the community	60	61	64
Promoting access to land		62	67
Improving basic health services	68	64	67
Ending political violence	57	64	68
Addressing educational needs of all South Africans	63	64	71
Delivering basic services. e.g. water and electricity		75	73
Promoting equality between men and women	72	75	78
Distributing welfare grants to those who are entitled	69	72	82

Generally, South African citizens have given the government positive ratings on its performance in delivering services. However, there seems to have been a decline in ratings as from 2006, and clearly the numbers do not present the complete picture, as in 2004 and 2009 there were spates of violent protests against the lack of services in communities.

Table 5.16 reveals that the government's most positive rating has been in the delivery of social grants and that it needs to improve its pace of delivery for basic services such as water and electricity, as this is where positive ratings dropped from 75 % in 2004 to 73% in 2008. The difference in percentages may be small, but the continuous wave of violent service delivery protests indicates people's growing unhappiness with government performance in these areas.

Afrobarometer⁹¹ survey results also revealed people's happiness with government performance on various issues until 2006. From 2006 to 2008, results on the delivery of basic services remained negative. The 2009 Development Indicators confirm the above results and reveal that positive ratings on government performance decreased from 72% in November 2006 to 58% in November 2008.

98. *How rigorous and transparent are the rules on corporate governance?
And how effectively are corporations regulated in the public interest?* (6)

The formation of the King Committee in 1992⁹² marked the beginning of corporate governance reforms in the country. South Africa is currently ranked among the best emerging economies in the world with a strong corporate governance framework. It is also praised for being guided by the best corporate principles and standards.⁹³

Since the reforms, both the government and the private sector have introduced various regulatory measures and legislative interventions that measure up to international standards.⁹⁴ Responding on the transparency of corporate governance rules in South Africa, experts for the 2007 United Nations Economic Commission for Africa (Uneca) study concluded that South Africa had performed well in ensuring transparency and

accountability. Respondents for the study were positive as well: 23% felt that the government always ensured transparency and accountability in corporate governance, and 49% felt that it often did so, while 21% felt that it only sometimes did.⁹⁵

South Africa's market environment is regulated through the Competition Act 89 of 1998, which establishes bodies such as the Competition Commission⁹⁶ that aim at curtailing corporate activities and unfair business practises which negatively affect the public interest. The Act was recently expanded and now includes a criminal sanction regime against individuals found guilty of causing companies to engage in illicit cartel conduct. The Competition Commission has in recent years successfully investigated and fined several major South African companies found in contravention of the competition law. In 2007, for example, Tiger Consumer Brands was fined R99 million for fixing bread prices,⁹⁷ while Sasol was given a fine of more than R250 million for anti-competitive conduct in the fertiliser industry.⁹⁸ Currently, four producers in the steel industry are awaiting the decision of the Competition Tribunal following an investigation by the Competition Commission into alleged price fixing and collusion in the steel industry.⁹⁹

The Financial Services Board¹⁰⁰ regulates financial markets and the non-banking financial services industry in the public interest. In 2004 the board's mandate was expanded to look into aspects of market conduct in the banking industry. Through the Market Abuse Department, it has been able to investigate and enforce action in cases of financial market abuse. Though the board has over the years strengthened its capability to enforce compliance with the regulatory framework, it continues to face challenges of enforcement.

While the regulatory framework has been greatly enhanced through a wide body of legislation and various initiatives, concerns remain with regard to the enforcement of these regulations. The literature still maintains that South Africa lacks the institutional capacity to implement legislation and generally faces challenges in ensuring compliance with the codes of good governance. Research further notes companies that do not operate in structured environments like the Judicial Services Commission (JSE), in which "the standards of corporate governance can be more easily identified, enforced and measured."¹⁰¹ Nevertheless, South Africa receives an index score of 6 for progress made in recent years.

99. To what extent are companies duty-bound to play a role in the realisation of socioeconomic rights? And to what extent do they prioritise responsible social investment? (5)

There is no law compelling private companies to be actively involved in the realisation of socio-economic rights. However, section 8(2) of the Constitution, 1996, and other pieces of legislation envisage a role for companies to play in the fulfilment of these rights. Section 8(2) of the Constitution states that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Other interventions that impose duties on companies include Black Economic Empowerment (BEE) regulations that encourage companies to spend on corporate social responsibility initiatives, and the codes on broad-based BEE (BBBEE), which require companies to spend a minimum of 1% of net profit after tax on corporate social investment (CSI) initiatives. The Broad-Based Black Economic Empowerment Act 53 of 2003 also requires companies that want to do business with the government to report on how far they have implemented BEE when measured against the seven BBBEE scorecard elements.¹⁰²

Over the years, private companies have accepted their socio-economic responsibilities, and some identify themselves as “corporate citizens” with rights and duties. These companies have contributed enormously to a range of corporate social responsibility initiatives and take this responsibility seriously,¹⁰³ while others do so to raise their profile and so on. A Trialogue¹⁰⁴ study revealed an increase in CSI spending from about R1.8 billion in 1998 to over R4 billion in 2008.¹⁰⁵ It is not clear what impact the global recession will have on company contributions, as the increases in CSI spending coincided with a period of good economic growth.

A KPMG BEE 2008 survey further revealed that socio-economic development remained a big priority for organisations of different sizes.¹⁰⁶ However, more needs to be done to ensure that social investment spending goes to meaningful and sustainable programmes and that it becomes the highest priority for companies of all types.¹⁰⁷

100. *Is the private sector meeting its new obligations, such as in relation to equity and empowerment responsibilities?* (4)

The Broad-Based Black Economic Empowerment Act of 2003 is the main legislation regulating the integration of previously disadvantaged people into the mainstream economy.¹⁰⁸ The Employment Equity Act, 1998, further lays down the obligations for employers in relation to achieving equitable representation in all occupational categories and levels in the workplace. The BEE Codes of Good Practice gazetted in 2007¹⁰⁹ have enabled the monitoring of BEE compliance, especially in the private sector, while the Commission for Employment Equity produces annual equity reports that trace both government and private sector compliance with the equity laws.

The Employment Equity report of 2008-2009¹¹⁰ revealed disturbing trends in the representation of African people at top management level in the private sector. It found that most top management positions were still held by white males and females. The report revealed that “white men represented 61% of top management positions, enjoyed 48% of all recruitment and made up 44.7% of all employees promoted to this level. At the top management level, black men represented 9.8%, enjoyed 12.6% of all recruitment and made up 12.7% of all employees promoted to this level.”¹¹¹

The report further revealed that coloured males held 3.5% of top management positions and Indian males 4.8%. White females were at 11.7%, followed by African females at 3.8%, coloured females at 1.2% and Indian females at 1.1%.

These results are in line with the KPMG 2008 BEE Survey,¹¹² which found that private companies were lagging behind in the implementation of four BBBEE scorecard elements, namely employment equity, skills development, preferential procurement and ownership control. When asked to report on the BBBEE scorecard elements they found difficult to implement, 100% of large businesses indicated that the most challenging elements to implement were employment equity¹¹³ and skills development, followed by ownership control for 92% of them and management control for 91%.¹¹⁴ Nonetheless, the 2009 results of the annual BWA South African Women in Corporate Leadership Census (shown in Table 5.17) concluded that there had been a steady increase in the representation of women in top executive positions in the corporate sector, though the numbers were low when compared to male representation.

Table 5.17: Women in management positions in the private sector¹¹⁵

	2007	2008	2009
Percentage of women in companies listed on the JSE's Alternative Exchange and in state-owned enterprises in all positions			
CEOs / MDs	2.5 %	3.9 %	3.6 %
Chairpersons	4.1 %	3.9 %	5.8 %
Directors	13.1 %	14.3 %	14.6 %
Executive managers	19.2 %	25.3 %	18.6 %

With regard to BEE transactions as a percentage of all mergers and acquisitions, the table below reveals a steady decline in the number of deals that have been concluded between 2004 and 2008. The table shows that the total value of transactions in 2004 was 30.1%, but this dropped to 19.5 % in 2008.

Table 5.18: BEE transactions¹¹⁶

		2000	2001	2002	2003	2004	2005	2006	2007	2008
Total BEE transactions	R bn	28	25	12	42	50	56	56	96	61
Total M&A transactions	R bn	371	502	242	150	166	269	284	514	312
BEE as % of all M&A transactions		7.5%	5.0%	5.1%	28.1%	30.1%	20.9%	19.7%	18.7%	19.5%

The figures demonstrate that the private sector needs to speed up its compliance with the law if it is to improve its delivery record. South Africa gets an index score of 4.

Conclusion

South Africa's democracy boasts a modern procedural framework that is well institutionalised. No discussion about the state of South Africa's democracy would be

complete, however, if we did not consider whether this framework had delivered substantive outcomes in the form of socio-economic rights. We have therefore examined a range of socio-economic indicators in an attempt to give a measurable understanding of the state of human dignity in South Africa.

Some of the indicators we considered were access to and the provision of basic services and necessities, health care, education, poverty and its alleviation, labour, corporate governance, and the role of capital in advancing human dignity. Several themes emerged from this.

The first is that South Africa's legal framework with regard to socio-economic rights twins democracy and human dignity. Democracy, as conceptualised by the Constitution, requires the advancement of human dignity in order for it to be sustainable and legitimate. Likewise, the advancement of human dignity can only happen within a democratic institutional framework. Second, although the legal framework for socio-economic rights may be fairly advanced by international standards, in practice South Africa is yet to successfully consolidate the link between human dignity and democracy. Third, South Africa is plagued by serious institutional failure at most points of delivery, such as public schools and hospitals, local government and the public service. Fourth, poor management at all levels of society, particularly near the grassroots, has resulted in a poor service culture in the public sector on which most ordinary South Africans depend for socio-economic delivery. Fifth, South Africa faces deep-seated socio-economic challenges left by the apartheid legacy, as in the case of the public education system and levels of poverty. Sixth, capital and business continue to wield a disproportionate amount of influence over policy-making, often to the detriment of ordinary citizens.

Nevertheless, South Africa's democracy has definitely advanced the human dignity of its citizens in numerous areas. But it is the inadequacy of that advancement that remains worrying. The indignity of poverty, unemployment and inequality continues largely unabated. Democracy is about whether the people rule, and whether they rule equally. In the case of South Africa, the vast majority of citizens are yet to enjoy their socio-economic rights equally.

ENDNOTES

- 1 We would like to extend our sincere thanks to the PIMS Budget Unit Manager, Len Verwey, for his advice and guidance with this section, and also to our colleagues in the Budget Unit, Musa Zamisa and Saranne Durham, for their technical input.
- 2 Constitution, 1996, preamble.
- 3 Constitution, 1996, Chapter 2.
- 4 The first judgment was in the nevirapine case, where the Treatment Action Campaign lodged legal action against the state for failure to roll out an antiretroviral programme for HIV-positive mothers and their children. The court ordered that the state had an obligation to provide treatment to prevent the transmission of HIV from infected mothers to their children. The second judgment came in the Grootboom case, where Irene Grootboom and 900 other destitute members of the Wallacedene community in Cape Town lodged legal action against the state for its failure to provide housing to them despite their destitution. The court pronounced that the state did indeed have an obligation to provide housing. In both cases, the court found that it was unreasonable to place limitations based on the availability of resources on these socio-economic rights, namely the right of access to housing and the right to health care services, respectively. In *Mazibuko and Others v City of Johannesburg and Others* CCT 39/09 (8 October 2009), the Constitutional Court rejected the approach of the Supreme Court of Appeal, which had held that the provision of 42 litres of water per day would be "sufficient water" within the meaning of section 27 of the Constitution. The Constitutional Court concluded that it was not appropriate for the Supreme Court of Appeal to give a quantified meaning to what constituted "sufficient water" in terms of the Constitution since this was a matter best addressed in the first place by the government. In affirming its rejection of the "minimum core" approach to the interpretation of socio-economic rights, the court highlighted that the obligation placed on the government by section 27 was an obligation to take "reasonable" measures to seek the progressive realisation of the right. Furthermore, according to the Constitutional Court, it was implicit in the concept of "progressive realisation" that it would take time before everyone had access to sufficient water. The key question in cases involving the realisation of socio-economic rights was thus whether the government's policy was a "reasonable" one.
- 5 Linda Jansen van Rensburg and Lucie Lamarche, Lucie, 2005, "The right to social security and assistance," in Danie Brand and Christof Heyns (eds) *Socio-Economic Rights in South Africa*, Pretoria: PULP, available at http://www.chr.up.ac.za/centre_publications/socio/book/Chapter%207-Social%20Security.pdf.
- 6 This is because it would be fiscally too great a risk and contrary to the constitutional limitation placed on the state's obligation regarding socio-economic rights, namely that they be progressively realised, contingent on the availability of resources. Key legislation such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 also seeks to promote greater access to work for citizens.
- 7 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
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- 9 Presidency, 2008b.
- 10 Children's Institute, 2009, available at <http://www.childrencourt.ci.org.za/indicator.php?id=3&indicator=41>
- 11 Presidency, 2009c, p. 30.
- 12 Statistics South Africa, 2008, *General Household Survey 2007*, available at <http://www.info.gov.za/view/DownloadFileAction?id=85974>.
- 13 Presidency, 2008b.
- 14 Presidency, 2009c, p. 38.
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- 16 Presidency, 2008a, p. 28.
- 17 Presidency, 2008b, p. 35.
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- 32 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).
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- 34 Statistics South Africa, 2009a, p. 5.
- 35 Constitution Chapter 2, Section 28, 1996.
- 36 South African Schools Act 84 of 1996, available at <http://www.info.gov.za/view/DownloadFileAction?id=70921>.
- 37 Statistics South Africa, 2008.
- 38 Presidency, 2008b, p. 45.
- 39 Presidency, 2008b, p. 48.
- 40 Presidency, 2008a, p. 22.
- 41 F. Fiske, F. and H. Ladd, 2004. *Elusive Equity: Education Reform in Post-Apartheid South Africa*, HSRC Press, p. 159.
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- 49 Haroon Borat and Carlene van der Westhuizen, 2008, p. 18.
- 50 Haroon Borat and Carlene van der Westhuizen, 2008, p. 19.
- 51 Haroon Borat and Carlene van der Westhuizen, 2008, p. 22.
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- 54 PIMS Idasa, 2009.
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- 64 The latest surveys by Statistics South Africa (the Community Survey for 2007 and the General Household Survey for 2007) and the 2009 Development Indicators (Presidency,

- 2009c) reveal impressive statistical progress in the delivery of basic services. Nevertheless independent research studies, grassroots organisations and the general public have argued that service delivery is fraught with many challenges relating to affordability, quality of services rendered and backlogs. Some communities have no access at all to services and if they do, the services are below the RDP standard.
- 65 For example, fewer than 50% of households in the Eastern Cape (40.3%), Mpumalanga (45%) and the North West (49.8%) said that they had access to removal services from the municipality. Gauteng experienced a decrease from 88.2% in 2002 to 85.7% in 2007. (Statistics South Africa, 2008, p. 37.)
 - 66 For a breakdown of the distribution of the waste service backlogs per municipal category, see DEAT, 2007, *Assessment of the Status of Waste Service Delivery and Capacity at the Local Government Level*, Department of Environmental Affairs and Tourism, Directorate: General Waste Management, available at <http://www.deat.gov.za/Services/booklets/Environmental/Solid%20Waste%20Assessment.pdf>.
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 - 68 Presidency, 2009c, pp. 31-33.
 - 69 The 2007 General Household Survey (Statistics South Africa, 2008) revealed that 71.7% of the people who received piped water from the municipality were happy with the service, while 24.4% complained of water interruptions at least once a month. This rate of water service interruptions was higher than the 20.7% recorded in 2002. The provinces with the most frequent water service interruptions were Limpopo (56.3%), Mpumalanga (47.0%), the Eastern Cape (31%) and the North West (30.6%).
 - 70 "Failure to pay the account in the concession area will result in a notification letter with an administration fee of R77.59 for 2007/8. If the account is still not settled, restrictors are installed, which cause a reduced flow of water – roughly equivalent to six kilolitres per month. In extreme cases, a household can be disconnected, provided a communal standpipe is available within 200 metres. The reconnection fee is currently R267.36." (*Water Dialogues Synthesis Report 2009*, iLembe case study, available at <http://www.waterdialogues.org/south-africa/research.htm>.)
 - 71 Presidency, 2009c, p. 33.
 - 72 Presidency, 2009c, p. 33.
 - 73 COGTA, 2009, *State of Local Government in South Africa: Overview Report*, Department of Co-operative Governance and Traditional Affairs, p. 7, available at <http://www.info.gov.za/view/DownloadFileAction?id=110100>.
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 - 77 See *Water Dialogues Synthesis Report 2009*, iLembe case study, p. 44, available at <http://www.waterdialogues.org/south-africa/research.htm>, and Ugu Case Study, Johannesburg Case Study, available at <http://www.waterdialogues.org/south-africa/resources.htm>; P. Bond and J. Dugard, 2008, "The case of Johannesburg water: What really happened at the pre-paid 'Parish pump'", *Law, Democracy and Development*, vol. 12, no. 1, pp. 1-28, available at <http://www.nu.ac.za/Ccs/files/Bond%20Dugard%20LDD.pdf>; and D. McDonald and J. Pape, 2002, *Cost Recovery and the Crisis of Service Delivery in South Africa*, Cape Town: HSRC Press.
 - 78 The Community Survey of 2007 reported an increase in the number of people who mentioned that they could not afford to pay for the water they were receiving from their municipality. The percentage increased from 11.7% in 2004 to 22.0% in 2007.
 - 79 The 2008 Development Indicators (Presidency, 2008b) based on Statistics South Africa estimates reveal that by 2006, 71.4% of 9.1 million consumer units received free basic water services and 46.5% of the 7.2 million consumers received free basic electricity services, while 49.7% of the 7.7 million consumer units received free basic sewerage and sanitation.
 - 80 See iLembe case study available at <http://www.waterdialogues.org/south-africa/research.htm> and the *Water Dialogues Synthesis Report 2009*, available at <http://www.waterdialogues.org/south-africa/resources.htm>.
 - 81 Section 207(1) of the Constitution, 1996, states that "when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

- 82 "Contracts between the State and private providers of public services are also designed to enable the latter to meet the former's requirements whilst remaining commercially viable, and balances are struck accordingly. Typically, they impose upon the providers a range of targets arising from public policy and include agreements defining limits on price increases or arrangements for setting prices. These agreements can prevent providers from imposing price increases except by agreement with the state body to which they are contracted." (B. Martin, 2001, *Privatisation of Municipal Services: Potential, Limitations and Challenges for the Social Partners*, Working Paper, International Labour Office, available at <http://www.ilo.org/public/english/dialogue/sector/papers/munserv/partners.pdf>.)
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- 84 In recent years some government departments and municipalities have themselves failed to abide by the accountability measures of the PFMA and Municipal Finance Management Act, with some consistently getting qualified audit reports. It would be strange to imagine that they would be able to enforce accountability on others.
- 85 A case study by Water Dialogue Research SA on iLembe District Municipality, which analysed the performance of Usiza Water Company against its contractual obligations, found that the company had constantly met and sometimes surpassed its performance targets. However, the study observed that this was a notable exception compared to other case studies, and such good performance was not based on active oversight by iLembe District Municipality but motivated by fear of losing the contract. See all case studies by Water Dialogue Research SA for in-depth findings. They are available at <http://www.waterdialogues.org/south-africa/resources.htm>.
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 - 100 The Financial Services Board is a unique, independent institution established by statute to oversee the South African non-banking financial services industry in the public interest. (<http://www.fsb.co.za/>)
 - 101 P. Armstrong, N. Segal and B. Davis, 2005.
 - 102 The seven areas are socio-economic development (corporate social responsibility), ownership control, management control, employment equity, skills development, enterprise development and preferential procurement.
 - 103 According to M. Spicer, CEO of Business Leadership South Africa, "CSI is becoming ever more strategically focused, with companies aligning their investment spend with their core business objectives and imperatives. This approach moves CSI out of the charitable sphere into one in which true partnerships bring about long-term sustainable development for the benefit of all. There is no doubt that in South Africa CSI is being taken far more seriously by business, both big and small." (CSI, 2009, *The Human Face of Business: A Showcase of South African Corporate Social Investment*, Creative Space Media.)
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 - 108 Republic of South Africa, Broad-Based Black Economic Empowerment Act (No. 53), 2003. Available at <http://www.info.gov.za/view/DownloadFileAction?id=68031>
 - 109 These codes "are to be applied in the development, evaluation and monitoring of BEE charters, initiatives, transactions and other implementation mechanisms". (DTI, 2004, *Codes of Good Practice 2004*, Department of Trade and Industry, available at <http://www.thedti.gov.za/bee/CODESOFGOODPRACTICE.htm>.) See also Background to, Intention & Application of the Codes of Good Practice, Department of Trade and Industry, 2007, pg 9, available at <http://www.dti.gov.za/bee/Inside.pdf>
 - 110 The report is based on data from the 7 000 companies that submitted their employment equity reports.
 - 111 See SAPA, 'Employment Equity 'too slow', Aug 24 2009, available at http://www.fin24.com/articles/default/display_article.aspx?ArticleId=2549977
 - 112 This survey looked at the pace of the implementation of BEE in the private sector taking into account all seven BBBEE scorecard elements.
 - 113 Respondents for the KPMG 2008 BEE Survey gave various reasons for the status quo. Some argued that they could not retain skilled black talent, while others maintained that there were not enough skilled black people available on the market to fill senior positions. For others, the problem was with the "shortage of specialised skills/shortage of skills in our industry – both black and white – and inadequate measures to deal with this skills shortage in the current business plan and growth projection". (KPMG, 2008.)
 - 114 KPMG, 2008.
 - 115 Businesswomen's Association, 2009, *BWA South African Women in Leadership Census 2009*, available at <http://www.bwasa.co.za/Census/2009CensusResults/tabid/14513/Default.aspx>.
 - 116 Presidency, 2009c, p. 18.

“Testing Democracy: Which Way is South Africa Going?” is an assessment by democracy institute Idasa of the state of democracy in South Africa today. It draws on *Idasa’s Democracy Index* – a unique barometer of 100 questions that measure progress in socio-economic delivery and the realization of the political rights of citizens.

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- Participation
- Elections
- Accountability
- Political Freedom
- Human Dignity

The third in *Idasa’s Democracy Index* series, this book argues that democracy needs economic development along with an embedded system of institutions, supported by active citizens and a vibrant political culture.

This book is a must read for all those wrestling with the challenges of consolidating democracy in Africa. South Africans have been granted a second chance to strengthen the foundations and practice of our democracy. These are lessons learnt from under-estimating the challenges of the practice of rights and responsibilities of citizens of a constitutional democracy.

*Mamphela Ramphele
Transformation Specialist*

“Testing Democracy: Which Way is South Africa Going?” is at once both a test of democracy and a testament to it. This book can guide openness and enquiry in our society, assist in identifying the deficiencies in our democracy and provide signposts to a sustainable democratic and developmental future.

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Processes Department, Electoral
Institute of Southern Africa*

Idasa is an independent public interest organisation committed to promoting sustainable democracy based on active citizenship, democratic institutions and social justice.



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